Supreme Court, U.S.
FILED

09-759 DEC 22 2009

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No. _____

IN THE

Supreme Court of the United States

EXELON CORPORATION,

Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE AND BRIAN A. HAMER, AS DIRECTOR OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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December 22, 2009

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QUESTIONS PRESENTED

1. Does a state violate the Fourteenth Amendment's Due Process Clause when its highest court holds that a long-standing statute entitles a taxpayer to tax credits for the twelve relevant years, but retroactively denies the taxpayer those tax credits, worth $80 million, by holding that it will give effect to that statute only "prospectively" from the date of its decision?

2. Does a state violate the Fourteenth Amendment's Due Process Clause when it holds out a statutory refund remedy for improper taxation, but its highest court forecloses that remedy by limiting its decision interpreting a controlling statute in the taxpayer's favor to apply only to future tax years?

3. Does a state violate the Fourteenth Amendment's Due Process Clause when its highest state court forecloses all possibility of a taxpayer's recovery on one claim, yet refuses, without explanation, to address the taxpayer's separate, properly preserved and presented alternative claim for relief?

PARTIES TO THE PROCEEDING

The petitioner is Exelon Corporation, the plaintiff and appellant below. The respondents are the Illinois Department of Revenue and Brian A. Hamer, as Director of Revenue, the defendants and appellants below.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Exelon Corporation states that it has no parent corporation, and no publicly held company owns more than 10% of Exelon's stock.

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PETITION FOR A WRIT OF CERTIORARI

Exelon Corporation ("Exelon") respectfully petitions this Court for a writ of certiorari to review the modified decision upon denial of rehearing of the Illinois Supreme Court.

OPINIONS BELOW

Exelon seeks review of the July 15, 2009 modified decision upon denial of rehearing issued by the Illinois Supreme Court in *Exelon Corp. v. Illinois Department of Revenue*, reprinted at Pet. App. A and pending publication in the official reporters. On February 20, 2009, the Illinois Supreme Court issued its original decision reversing the courts below. This opinion is unreported but reprinted at Pet. App. B. Defendants petitioned for rehearing. On July 15, 2009, the court denied the petition but modified its original decision to affirm the courts below. Exelon filed a petition for rehearing, which the court denied without opinion on September 28, 2009, in an unpublished order reprinted at Pet. App. C.

JURISDICTION

The Illinois Supreme Court issued its modified opinion upon denial of rehearing on July 15, 2009, and denied Exelon's timely petition for rehearing on September 28, 2009. (Pet. App. A; Pet. App. C.) As explained in more detail below, this Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV. (Pet. App. D at 159a-160a.)

35 ILCS 5/201(e) (2008). (*Id.* at 161a-167a.)

STATEMENT OF THE CASE

This case involves a state supreme court's unjustified refusal, without notice or a hearing, to allow a taxpayer to receive tax credits under a statute in effect during the relevant tax years, even though the court also expressly held that the statute authorized that taxpayer to receive those credits. By refusing to apply the statute as the Illinois General Assembly enacted it, the Illinois Supreme Court created a *retroactive* change in statutory law, which denied the taxpayer more than $80 million and twelve separate years' worth of state income tax credits. Although the following Statement describes in brief a state statute, that statute is *not* at issue here because the Illinois Supreme Court held that Exelon qualified for tax credits under it. What is at issue is whether that court violated the *federal* Constitution by refusing to apply that statute and depriving Exelon of its right to more than $80 million in tax credits.

Exelon's subsidiary Commonwealth Edison Company ("ComEd") is a regulated utility engaged in generating, transmitting, and distributing electricity in Illinois. (C14, 81, 268-69.)[1] In 1995 and 1996,

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[1] Citations to C__ are to the record on appeal.

ComEd purchased and developed nearly $3 billion of property and placed it into service in Illinois for use in ComEd's electric utility business.[2] (C14, 81-82.) ComEd filed its Illinois income tax and personal property tax replacement income tax returns for 1995 and 1996 on a combined basis with Exelon, its ultimate corporate parent. In these returns, as amended, Exelon claimed state investment tax credits under 35 ILCS 5/201(e) (2008) for the investments it made in this utility property.[3] (C15, 82.)

In 2002, Defendant Illinois Department of Revenue ("the Department") denied the credits in their entirety, contending that ComEd was not engaged in "retailing" under Section 5/201(e)(2)(D) because, according to the Department, the sale of electricity was not "the sale of tangible personal property ... or services" as required by the statute. (C89, 92-93.) Exelon submitted an administrative protest and requested a hearing, asserting both

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[2] The investment credit is 0.5% of the basis of qualified property. 35 ILCS 5/201(e)(1) (2008). For 1995 and 1996, ComEd claimed credits in the amount of $14,817,622, based on capital investments totaling $2,963,524,400. (C82.)

[3] Exelon also claimed investment tax credits based on its investments in additional property in Illinois for the tax years 1997-1999 and 2001-2007 (D.Pet. 12-13), and could claim credits for 2008 if it prevails here. Thus, Exelon claimed credits for twelve outstanding tax years. Exelon's request for a $14.8 million refund for 1997 through 1999 is pending in Illinois Circuit Court; that case, which involves the same issues as this one, was stayed pending the outcome of this case. (*Id.* at 12, 13 & n.2.) Exelon claimed more than $80 million in investment tax credits from 1995 through 2007. (*Id.*)

(i) that electricity met the definition of "tangible personal property" and (ii) that the Department's refusal to grant the credits to Exelon (an electric utility) yet allowance of the credits to gas utilities and a combined electric/gas utility violated the Uniformity Clause of the Illinois Constitution of 1970.[4] (C38-42, 82-88.)

After losing on both grounds in the administrative protest, Exelon petitioned for review in Illinois Circuit Court. (C7, C12-42.) The circuit court affirmed the agency's decision, on both statutory and constitutional grounds, and Exelon appealed to the Illinois Appellate Court. (C545, 567-68.) The appellate court also affirmed on both grounds. *Exelon v. Ill. Dep't of Revenue*, 876 N.E.2d 1081 (Ill. App. Ct. 2007), *aff'd*, slip op. (Ill. July 15, 2009).

Exelon sought and obtained leave to appeal to the Illinois Supreme Court. (Pet. App. B at 90a.) After briefing and oral argument, the Illinois Supreme Court reversed on February 20, 2009. (*Id.* at 111a.) The court held that electricity was "tangible" within the meaning of the investment tax credit statute and that Exelon was entitled to the tax credits it sought. (*Id.* at 110a-111a.) Because the court's decision on statutory grounds had the effect of

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[4] The Uniformity Clause protects Illinois taxpayers against arbitrary or unfair tax classifications. It provides: "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. CONST. 1970, Art. IX, § 2.

granting Exelon its sought relief, the court deemed it unnecessary to address Exelon's alternative claim for relief based on the Department's violation of the Illinois Constitution's Uniformity Clause. (*Id.* at 110a-111a.)

The Department petitioned the Illinois Supreme Court for rehearing. In its petition, the Department requested – for the very first time in the more than seven years of proceedings in this case – that the court apply its interpretation of Section 5/201(e), the controlling statute, on a prospective-only basis. (D.Pet. at 8-17.)[5] The Department asserted, among other things, that the state would have difficulty refunding Exelon's money for the twelve separate tax years at issue (*id.* at 13-14) – even though Exelon had committed to accept its refund as future tax credits allocated reasonably over a number of years (P.Pet. at 11), as Illinois law authorizes, 35 ILCS 5/909(a).

Under Illinois Supreme Court Rule 367(d), Exelon was not permitted to answer the petition except by order of the court. The court did not order an answer. Thus, Exelon did not have any opportunity to respond to the Department's petition.

On July 15, 2009, the Illinois Supreme Court issued an order denying the Department's petition but modifying the court's February 20, 2009 decision to apply only to tax years ending *after* December 31, *2008*. (Pet. App. A at 22a-24a.) This result was an about-face from the court's earlier opinion: although

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[5] Citations to "D.Pet." are to the Defendants' petition for rehearing at the Illinois Supreme Court; citations to "P.Pet." are to Exelon's petition for rehearing.

the court reaffirmed its original holding that Exelon was entitled to the tax credits under the controlling statute, Section 5/201(e)(2)(D), it limited that holding to prospective-only application and thereby made it impossible for Exelon to receive those tax credits. (*Id.* at 23a-24a.) The court's decision to apply its opinion prospectively-only changed the court's holding from a reversal to an affirmance of the lower court's decision. (*Id.* at 24a.)

The court also refused to decide Exelon's remaining claim for relief under the Illinois Constitution. (*Id.*) The dissent recognized that, having eliminated Exelon's relief on its statutory claim, the court was obliged to address Exelon's independent state constitutional claim challenging the classification the Department drew between gas utilities and electric utilities. (*Id.* at 86a-88a.) The court, however, ignored that claim. (*Id.* at 24a.)

Exelon sought and received leave to file a petition for rehearing, which argued that prospective-only application violated its federal due process rights. (P.Pet. at 13, 24-27.) In particular, Exelon argued that the court's denial of relief (i) created a retroactive change in the statutory law that violated the Due Process Clause and (ii) operated on Exelon an unconstitutional "bait and switch." (*Id.* at 24-27.) Exelon also argued that, at the very least, the court's elimination of relief on Exelon's statutory claim required the court to decide Exelon's constitutional claim. (*Id.* at 15, 27.) Exelon did not raise its federal constitutional arguments until its petition for rehearing because only the Illinois Supreme Court's modified decision violated

Exelon's federal due process rights. On September 28, 2009, the court denied Exelon's petition without opinion. (Pet. App. C.)

REASONS FOR GRANTING THE WRIT

First, this Court should grant certiorari to determine whether the Due Process Clause limits a state court's decision refusing to apply a long-standing state tax statute to grant tax credits to a taxpayer clearly entitled to them. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), this Court suggested that such state court decisions do not implicate federal constitutional concerns. That decision, however, conflicts with more recent Supreme Court precedent holding (i) that due process limits retroactive tax legislation, *see, e.g.*, *United States v. Carlton*, 512 U.S. 26, 30-33 (1994), and (ii) that states, including state courts, must comply with due process even when applying their own laws and rules, *see, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985). In this case, the Illinois Supreme Court's denial of more than $80 million in overdue tax credits through its decision to apply its statutory interpretation only prospectively calls the validity of *Sunburst Oil* into question, for the fourteen-year period of retroactivity would violate due process if effectuated through legislative action. This case also presents the question left unaddressed in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam): whether due process places limits on a state court's ability to apply its statutory interpretations retroactively or prospectively. This

Court should grant certiorari to resolve this open question.

Second, this Court should grant certiorari to decide whether due process prohibits a state from holding out a tax refund as a remedy for improper taxes but denying "meaningful backward-looking relief," *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), to a taxpayer as a result of a state court's refusal to grant that refund despite holding that the taxpayer qualified for it. States are prohibited from changing the rules for challenging a state tax in the middle of the challenge. *Reich v. Collins*, 513 U.S. 106 (1994). This Court should grant certiorari to extend *Reich* to state courts' bait-and-switch denial of backward-looking relief for taxes that are improper under state law.

Third, this Court should grant certiorari to resolve whether a state violates due process when its highest state court refuses to grant the taxpayer relief and then also refuses, without notice, or hearing, or explanation, to address a taxpayer's remaining viable, alternative claim for relief. This Court's precedent establishes that Exelon had a vested right in the cause of action that the Illinois Supreme Court refused to adjudicate, and that state courts must comply with due process even when implementing their own judicial systems. But this Court has not addressed the extent to which a refusal to render an ultimate decision on appeal in a viable claim violates due process. The Court should grant certiorari to decide that the Due Process

Clause limits arbitrary state court appellate action such as the Illinois Supreme Court's here.

I. This Court Should Grant Certiorari To Determine Whether A State Violates Due Process When Its Highest Court Decides To Apply A Long-Standing Statute Only "Prospectively" And So Retroactively Denies A Taxpayer Millions In Tax Credits It Earned Fourteen Years Ago Under The Statute.

The First Question Presented asks whether the Due Process Clause prescribes limits on a state court's ability to apply a statute only prospectively, even though the statute was in effect at the time of the parties' conduct. This question presents the opportunity to resolve a conflict between two lines of this Court's precedent – precedent holding that state court decisions on retroactive or prospective application do not implicate federal constitutional concerns, and precedent holding that federal due process limits the imposition of retroactive changes in the law.

This case presents the paradoxical situation where a state court's *prospective only* application of its interpretation of a long-standing statute results in a *retroactive* change in that statute. In both its original and modified opinions, the Illinois Supreme Court held that Exelon's business met the Illinois investment tax credit statute's terms and, therefore, that Exelon was entitled to the credits. (Pet. App. A at 22a, 24a; Pet. App. B. at 90a, 111a.) The court denied Exelon the tax credits it earned thirteen and fourteen years ago not because the statute at the

time barred Exelon's recovery but because *the court*, in 2009, decided *not to apply* the statute that existed in 1995 and 1996. Had the Illinois General Assembly in 2009 passed legislation deleting the investment tax credit statute from 1995 on, the effect on Exelon would have been no different.[6]

Put another way, fourteen years ago, and every year since, Exelon invested billions of dollars in the State of Illinois by purchasing and developing property and placing it into service as part of Exelon's electric utility business. (Pet. App. A at 2a-3a.) Based on the language of the investment tax credit statute, Exelon understood that its investments would earn it millions in state tax credits that were intended to give businesses an incentive to invest in Illinois. (P.Pet. at 7-9.) In both its original and modified decisions, the Illinois Supreme Court *confirmed* that Exelon's investments met the statutory requirements (Pet. App. A at 22a, 24a; Pet. App. B. at 90a, 111a), as those requirements existed in 1995, 1996, and each and every tax year since, *see* 35 ILCS 5/201(e) (2008).

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[6] The Illinois Supreme Court also gave Exelon no opportunity to be heard on the issue of prospective-only application. That Exelon was allowed to petition for rehearing (which the court denied without opinion) after the court issued its modified decision does not mean that the state court heard Exelon on the retroactivity issue: due process requires an "opportunity to be heard ... at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). An opportunity to state one's views *after* a court has decided the matter is not meaningful. *See id.* at 551-52 (due process violation where the opportunity to be heard came only after court had entered an adverse decree).

Indeed, it was only this year – after the Illinois Supreme Court's original decision in Exelon's favor but before its modified decision denying Exelon any relief – that the Illinois General Assembly changed the language of the statute so that Exelon did *not* meet its terms for tax years ending after December 31, 2008. (P.Pet. at 9, 12); *see* 35 ILCS 5/201(e) (2009). (This change in statutory language meant that when the court issued its prospective-only modified decision, that decision would have no effect in the past or in the future.)

Accordingly, but for the Illinois Supreme Court's choice to apply its decision only prospectively, the law granted Exelon – and Exelon would have received – a refund for the tax credits it began earning fourteen years ago: the credits at issue in this case (earned in 1995 and 1996), and the credits at issue in the case stayed pending the outcome of this case (earned in 1997 through 1999) and in the other open tax years (earned in 2001 through 2008). Thus, by refusing to apply the investment tax credit as it existed in 1995 and 1996, the Illinois Supreme Court imposed on Exelon its own retroactive change in the investment tax credit statute. This Court should grant certiorari to decide that the Due Process Clause limits arbitrary, retroactive state court appellate action such as that of the Illinois Supreme Court in this case.

A. The Illinois Supreme Court's Retroactive Change In The Law Highlights A Conflict Between Two Lines Of This Court's Due Process Jurisprudence.

The Illinois Supreme Court's retroactive denial of Exelon's tax credits implicates two conflicting lines of Supreme Court precedent. On one hand, this Court has repeatedly held that retroactive tax legislation can be "so harsh and oppressive as to transgress the constitutional limitation" of due process. *Welch v. Henry*, 305 U.S. 134, 147 (1938). Where retroactive tax legislation is enacted with an illegitimate or arbitrary purpose, or where there is more than "a modest period of retroactivity," the legislation violates due process. *See United States v. Carlton*, 512 U.S. 26, 32-33 (1994).

If effectuated through legislative action, the fourteen-year period of retroactivity in Exelon's case would violate due process. The fourteen-year period is nearly three times larger than the five-year period upheld in *General Motors Corp. v. Romein*, 503 U.S. 181, 191-92 (1992); seven times larger than the two-year retroactivity period upheld in *Welch*, 305 U.S. at 151; and nearly *fourteen* times larger than *Carlton*'s "modest period of retroactivity" of just over a year, 512 U.S. at 32-33. And though the retroactive effect is not quite the 30- to 50-year period of retroactivity of the congressional statute held unconstitutional in *Eastern Enterprises v. Apfel*, the amount Exelon has been retroactively deprived – more than $80 million – is every bit the "substantial" $50 to $100 million liability that "raise[d] substantial questions of fairness" under the Takings Clause

analysis applied in that case. 524 U.S. 498, 529, 532, 534 (1998) (plurality opinion).

It should make no difference that the retroactive change here arose through judicial rather than legislative action. The Court has long held that the Fourteenth Amendment's due process "prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities." *Scott v. McNeal*, 154 U.S. 34, 45 (1894). A constitutional "violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930). Thus, this line of precedent suggests that the Illinois Supreme Court could *not*, consistent with due process, retroactively change the law to deny Exelon the credits it earned thirteen and fourteen years ago.

By contrast, another line of this Court's precedent suggests that a state court may decide to apply its state-law decisions retroactively or only prospectively without implicating federal constitutional concerns. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), this Court rejected a federal constitutional challenge to a state court's decision in a civil case to adhere to judicial precedent for past cases and the case at bar but not for future cases. The Court held that "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward" and explained that "the Federal Constitution has no voice upon the subject." *Id.* at

364. Lower courts continue to apply *Sunburst Oil* to justify refusing to consider the due process implications of state court decisions on retroactive or prospective application. *See, e.g.*, *Henry v. Ricks*, 578 F.3d 134, 140-41 (2d Cir. 2009); *Antonello v. Wunsch*, 500 F.2d 1260, 1263-64 (10th Cir. 1974); *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 884 N.E.2d 1056, 1061-62 (Ohio 2008); *Calaway v. Schucker*, 193 S.W.3d 509, 518-19 (Tenn. 2006).

In the years since *Sunburst Oil*, however, this Court has repeatedly held that a state must comply with due process, even when applying its own rules. In *Evitts v. Lucey*, 469 U.S. 387, 396-99 (1985), the Court held that a state violated due process when its appellate court dismissed a criminal appeal because defense counsel failed to comply with a state court procedural rule. The Court rejected the state's argument that because its appellate system was discretionary, the state was not required to comply with due process: "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." *Id.* at 400-01. "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.* at 401; *accord, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) (state drivers' licenses); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (state welfare benefits).

By suggesting there are no due process limits on judicial decisions regarding retroactivity, *Sunburst Oil* conflicts with (i) the Court's jurisprudence

placing constitutional limits on retroactive legislative tax law changes; and (ii) the Court's jurisprudence requiring states to comply with due process even when applying their own law and rules.

With this case, the Court can resolve this conflict, and impose due process limits on state court retroactivity decisions in tax matters. This case presents the ideal opportunity to recognize that a retroactive change in a tax law, with a significant period of retroactivity, is no less "harsh and oppressive," *Welch*, 305 U.S. at 147, because it occurs through state judicial fiat rather than legislative mandate.

B. This Case Presents The Question Left Undecided In *Fiore v. White*: Whether Due Process Places Limits On A State Court's Ability To Apply Its Statutory Interpretations Retroactively Or Prospectively.

This Court previously granted certiorari on, but then did not reach, a question analogous to that presented here. In *Fiore v. White*, 531 U.S. 225, 226 (2001) (per curiam), after a defendant's criminal conviction under state statute became final, the Pennsylvania Supreme Court interpreted the same statute in a manner that meant the defendant's conduct was legal. The Court granted certiorari to decide "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.* The Pennsylvania Supreme Court, responding to a certified question from this Court, explained that its interpretation of the

criminal statute "did not announce a new rule of law." *Id.* at 228. Consequently, this Court held that because the Pennsylvania decision "merely clarified the statute and was the law of Pennsylvania – as properly interpreted – at the time of [the] conviction," the case "present[ed] no issue of retroactivity." *Id.* Thus, the Court decided that due process barred the state from convicting a person "for conduct that its criminal statute, as properly interpreted, d[id] not prohibit." *Id.* The Court left unaddressed the question upon which it had granted certiorari.

The question left open in *Fiore* is presented in a more straightforward manner in this case. Here, as in *Fiore*, the basic question is whether due process sets limits on a state court's ability to apply its decisions retroactively or prospectively. But unlike *Fiore*, this case does not ask the Court to decide the complicated question of whether due process requires state courts to apply new rules to cases that already have become final. Rather, here, the question is whether due process requires a state court to apply a statute in effect at the time of the conduct at issue *in the very case* in which the court holds that the statute applies to that conduct (and in additional pending cases also concerning conduct that occurred while the statute was in effect).

Even if *Sunburst Oil* is correct that most state court decisions applying a holding retroactively or only prospectively can do so without violating federal due process, the Constitution must set some limits. Without such limits, states will seek – as Illinois did here – to accomplish through the judiciary the kind

of retroactive changes in the law that the legislature cannot. This Court should grant certiorari to decide this question.

II. This Court Should Grant Certiorari To Decide Whether A State That Holds Out A Refund Remedy For Improper Taxation Violates Due Process When Its Highest Court Refuses To Grant That Refund, Despite Holding That The Taxpayer Is Entitled To Millions In Tax Credits Under The Statute In Effect At The Time.

The Second Question Presented asks this Court to decide whether due process imposes a limit on a state's ability to "bait and switch" with respect to taxation under state law – to hold out and then arbitrarily deny a statutory refund remedy for taxes improperly assessed under state law.

Following the procedures prescribed by Illinois law, Exelon filed a claim for a tax refund based on its entitlement to investment tax credits. *See* 35 ILCS 5/909; 86 Ill. Admin. Code 100.9400(f). Exelon understood that it could challenge through legal action the unwarranted denial of tax credits and receive a refund if successful. Indeed, the Department's own regulations provide: "The Department *shall credit* the amount of any overpayment including interest allowed thereon against any liability for tax imposed ... and it *shall refund* the balance to such person." 86 Ill. Admin. Code 100.9400(a) (emphasis added); *see also* 35 ILCS 5/904(a) ("....If the Department finds that the tax paid is more than the correct amount, it *shall credit*

or refund the overpayment as provided by Section 909....") (emphasis added).

Accordingly, Exelon filed an administrative protest and then legal action to challenge the Department's improper denial of the investment tax credits Exelon had earned. After seven years of costly litigation, the Illinois Supreme Court held that Exelon did meet the statutory requirements to receive those credits. (Pet. App. B at 111a.) But after Exelon initially prevailed, the Illinois Supreme Court took away that relief – on *denial of rehearing*, no less, and without any hearing on the matter – by choosing to apply its holding only prospectively. (Pet. App. A at 24a.) Thus, after holding out what appeared to be a "clear and certain remedy," *Atchison, T. & S.F. Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912), the state changed the refund rules mid-course.

Indeed, the Illinois Supreme Court's decision amounted to a *double* bait-and-switch: based on the promise of tax credits provided by the investment tax credit statute, Exelon invested billions in Illinois. Based on the promise of a tax refund, Exelon paid its taxes and challenged the Department's incorrect statutory interpretation through administrative and then legal proceedings. Through its modified decision, the Illinois Supreme Court eliminated *both* promised results.

"Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corp. v. Div. of Alcoholic*

Beverages & Tobacco, 496 U.S. 18, 36 (1990). Such "procedural safeguards" can include *either* pre- or post-deprivation process. *Id.* at 36-37. But if a state chooses the latter, due process requires "not only a fair opportunity to challenge the accuracy and legal validity of their obligation, but also a clear and certain remedy for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 39. In particular, due process "obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. Although a state can decide in the first instance what the relief for an unconstitutional tax should be, there must be *some* form of backward-looking relief, in the form of a refund or other relief. *Id.* at 40, 43.

This Court has rejected state court attempts to provide only prospective relief for unconstitutional taxes. In *McKesson*, this Court rejected a state court's prospective relief, in the form of an injunction and a declaratory judgment, as sufficient under due process to remedy the appellant's payment of an unconstitutional tax. *Id.* at 31. Similarly, in *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504-05 (1928), the Court rejected the Montana Supreme Court's decision to overrule prospectively a previous interpretation of a state tax law yet refuse to grant a refund of the unconstitutional tax. The Court explained that prospective relief "di[d] not cure the mischief which had been done under the earlier [unconstitutional] construction." *Id.*

In other words, this Court has recognized that the right to challenge an unconstitutional tax is meaningless if some "backward-looking relief" is not provided. Similarly, here, Exelon's right to challenge the Department's incorrect statutory interpretation has been rendered meaningless by the Illinois Supreme Court's arbitrary refusal to grant backward-looking relief.

In *Reich v. Collins*, 513 U.S. 106, 111-14 (1994), this Court held that a state violated due process by holding out a clear and certain remedy for a taxpayer's payment of unconstitutional taxes, yet eliminating that remedy through a state court ruling that the taxpayer should have challenged the tax through the state's predeprivation procedure instead. This Court reasoned that although "[a] State has the flexibility to provide [a] remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both," a state "may not ... hold out what plainly appears to be a clear and certain postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id.* at 108. Thus, "a State may *not* ... reconfigure its scheme, unfairly, in *mid-course*." *Id.* at 111 (Court's emphasis).

Likewise, in *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442, 444-45 (1998) (per curiam), the Court rejected a similar state court attempt to deny a taxpayer a refund for an unconstitutional tax, reasoning that "[w]hile Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers ... who reasonably relied

on the apparent availability of a postpayment refund when paying the tax."

Although *McKesson*, *Reich*, and *Newsweek* provide support for Exelon's position, this Court has not addressed the precise "bait and switch" situation presented here. In this case, the state court denied "meaningful backward-looking relief" for improper state taxes not because it held Exelon should have used predeprivation procedures instead, but rather because the court simply did not want to provide such relief. Whether motivated by the Department's fiscal concerns (though Exelon had agreed to work with the Department to minimize the impact) or some other concern, the court simply took away Exelon's remedy. In this way, the court had even less purported justification for its actions than the courts in *Reich* and *Newsweek*, which each noted the available predeprivation procedures. *McKesson* and *Reich* suggest that the Due Process Clause places limits on a state court's ability to mandate this kind of bait and switch. The Court should grant certiorari to answer this question.

III. This Court Should Grant Certiorari To Decide Whether A State Violates Due Process When Its Highest Court Modifies Its Decision To Foreclose A Taxpayer's Recovery Yet Refuses To Address The Taxpayer's Alternative Claim For Relief.

This Petition also presents the question of when federal due process prohibits a state's highest court from refusing, without notice, hearing, or

explanation to decide on appeal a taxpayer's valid and procedurally proper claim for relief.

The Fourteenth Amendment's Due Process Clause protected Exelon's right to present and obtain a ruling on its claim under the Uniformity Clause of the Illinois Constitution. This Court has long held that "a vested cause of action is property and is protected from arbitrary interference." *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15 (1950). Thus, federal due process "prevent[s] the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Logan*, 455 U.S. at 429-30 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)).

Here, the framers of the Illinois Constitution of 1970 chose to grant Illinois citizens the right to be free from taxation based on arbitrary classifications. Under Illinois law, Exelon had but one way – use of the court system – to challenge the Department's violation of the Uniformity Clause deriving from its arbitrary denial of the investment tax credits to Exelon's electric utility and simultaneous grant of the credits to gas utilities and a combined electric/gas utility. Exelon followed the Illinois procedure by filing an administrative protest and then challenging the Department's action in court. Exelon properly presented its constitutional claim;

each lower court recognized as much by directly addressing it. *E.g.*, *Exelon*, 876 N.E.2d at 1085-88.

Yet the Illinois Supreme Court refused to decide the claim. In its original decision, where the court granted Exelon relief on its statutory claim, the state constitutional issue became moot. (Pet. App. B at 110a-111a.) But when the court eliminated this relief in its modified decision, it necessarily resurrected Exelon's independent constitutional claim. The court's error in failing to address this claim is fully evident in its modified opinion. Despite the 180-degree turnabout in the outcome, from reversal to affirmance, the court justified its refusal to decide Exelon's constitutional claim with the very same language found in the original opinion: "Our disposition of this cause obviates the need to determine whether the Department violated the uniformity clause of the Illinois Constitution...." (Pet. App. A at 24a; Pet. App. B. at 110a.)

Exelon reasserted its Uniformity Clause claim in its petition for rehearing. (P.Pet. at 15-24.) The court again refused to hear this claim, this time denying that petition without a word of explanation. (Pet. App. C.) Exelon has no remaining state-law recourse to challenge the Department's Uniformity Clause violation for the tax years at issue in this case.

This Court's "decisions have emphasized time and again [that] the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan*, 455 U.S. at 433. If a state chooses to provide parties with the ability to appeal adverse decisions, it must conduct

the appeal consistent with due process. *Evitts*, 469 U.S. at 400-01.

Yet here, for no reason at all, the Illinois Supreme Court arbitrarily and unjustifiably refused to hear Exelon's properly presented and preserved constitutional claim. At a *minimum*, the Due Process Clause guards against such arbitrary decision-making with regard to a vested right. *See Logan*, 455 U.S. at 428; *Boddie*, 401 U.S. at 380; *Gibbes*, 290 U.S. at 332. This Court should grant certiorari to clarify this issue.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix

Appendix A

Docket No. 105582.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

EXELON CORPORATION, Appellant, v. THE DEPARTMENT OF REVENUE *et al.*, Appellees.

Opinion filed February 20, 2009.–Modified Upon Denial of Rehearing July 15, 2009.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

Justice Thomas specially concurred, with opinion.

Justice Thomas also dissented upon denial of rehearing, with opinion.

Justice Burke took no part in the decision.

OPINION

Plaintiff, Exelon Corporation, as successor to Unicom Corporation, filed a complaint in the circuit court of Cook County seeking administrative review of a decision by the Department of Revenue (Department). The Department denied plaintiff's claim for replacement tax investment credits provided by section 201(e) of the Illinois Income Tax Act (35 ILCS 5/201(e) (West 1994)). The circuit court confirmed the Department's decision, and the appellate court affirmed. 376 Ill. App. 3d 918. We allowed plaintiff's petition for leave to appeal (210 Ill. 2d R. 315(a)).

I. BACKGROUND

The facts are undisputed. Commonwealth Edison (ComEd) was a wholly owned subsidiary of Unicom Corporation. During the years 1995 and 1996, ComEd was a public utility company principally engaged in the production, purchase, transmission, distribution and sale of electricity. During those years, ComEd bought nearly $3 billion in property that it used for generating, transmitting, and distributing electricity to its customers.

Unicom filed a combined 1995 and 1996 Illinois tax return. Unicom was liable for the "personal property tax replacement income tax" imposed by section 201(c) of the Illinois Income Tax Act. See 35 ILCS 5/201(c) (West 1994). Unicom timely filed amended returns, in which it claimed investment credits against this tax liability provided by section 201(e) of the Income Tax Act. Section 201(e)

provides a tax credit for investments in property used in Illinois by, among others, retailers. The section defines "retailing" as "the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities." See 35 ILCS 5/201(e) (West 1994). Unicom claimed a section 201(e) credit of $10,419,507 for 1995, and claimed a section 201(e) credit of $4,398,115 for 1996. The Department denied both claims.

Unicom filed an administrative protest and requested a hearing. The Department and Unicom filed cross-motions for summary judgment. The sole disputed point of law was whether Unicom was engaged in "retailing" as defined by section 201(e). The Department contended that Unicom was not engaged in retailing because it did not sell "tangible personal property," but rather sold electricity, which was intangible. Unicom contended that electricity was "tangible personal property" as required by the statute. Unicom attached to its motion an affidavit and report from its expert witness, Dr. Joel Fajans, a professor of physics at the University of California, Berkeley. Dr. Fajans opined that "as a matter of irrefutable scientific fact, electricity is physical and material" because it can be measured and stored, obeys physical laws, and "can be felt, tasted and seen."

Unicom further contended that the Department's denial of the section 201(e) credit violated the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). Unicom claimed that it was the Department's policy to grant such tax

credits to natural gas utility companies but not to electric utility companies. Unicom argued that there was no possible justification for discriminating between natural gas and electric utilities based on the purposes and object of section 201(e).

The Administrative Law Judge (ALJ) recommended granting summary judgment in favor of the Department. The ALJ's written recommendation accepted the Department's arguments, which did not include any rebuttal of Dr. Fajans' expert opinion. Relying on this court's decision in *Farrand Coal Co. v. Halpin*, 10 Ill. 2d 507 (1957), the ALJ concluded that the General Assembly did not intend to include electricity within the meaning of "tangible personal property" when enacting section 201(e). Also, the ALJ accepted the Department's argument pertaining to the uniformity clause. The ALJ concluded: "[T]here is a real and substantial difference in the classes of persons to whom the credit is available, and that this difference is related to Illinois' longstanding [*sic*] public policy of treating differently, for tax purposes, persons who sell tangible personal property versus persons who do not." The Director of Revenue accepted the ALJ's recommendation.

Unicom filed a complaint for administrative review of the Department's decision. Exelon thereafter succeeded Unicom. The circuit court substituted Exelon for Unicom in the case caption, and confirmed the Department's decision.

The appellate court upheld the circuit court's confirmation of the Department's decision. 376 Ill.

App. 3d 918. The appellate court viewed this court's *Farrand Coal* decision as dispositive of the case and concluded that it was "bound by the principle of *stare decisis* and must adhere to the decisions of our supreme court." 376 Ill. App. 3d at 922. The appellate court held that, as a matter of law, Exelon did not engage in the sale of "tangible personal property" as required by section 201(e) of the Income Tax Act. 376 Ill. App. 3d at 921-23. Also, the appellate court rejected Exelon's uniformity clause challenge. 376 Ill. App. 3d at 923-27. Exelon appeals to this court.

II. ANALYSIS

A. Standard of Review

The Income Tax Act provides that judicial review of the Department's decisions be in accordance with the Administrative Review Law (735 ILCS 5/3–101 *et seq.* (West 1994)). 35 ILCS 5/1201 (West 1994). In a case arising under the Administrative Review Law, we review the decision of the administrative agency, not the determination of the circuit court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007); *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006).

The Administrative Review Law provides that judicial review extends to all questions of law and fact presented by the entire record. 735 ILCS 5/3–110 (West 1994). The proper standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and

law. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008); *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 142 (2006). The Review Law limits judicial review to the administrative record; the court may not hear new or additional evidence. The statute additionally mandates that the "findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3–110 (West 1994). Accordingly, when a court reviews an administrative agency's factual findings, it will not reweigh the evidence or substitute its judgment for that of the agency. Rather, the court will only ascertain whether such findings of fact are against the manifest weight of the evidence. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005); *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 471-72 (2005). In contrast, an agency's conclusion on a question of law is reviewed *de novo*. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577; *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998).

A mixed question of fact and law asks the legal effect of a given set of facts. *Cinkus*, 228 Ill. 2d at 211; *Comprehensive Community Solutions*, 216 Ill. 2d at 472. Mixed questions of fact and law are " 'questions in which the historical facts are admitted or established, the rule of law is undisputed, and

the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577, quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 72 L. Ed. 2d 66, 80 n.19, 102 S. Ct. 1781, 1790 n.19 (1982). An agency's conclusion on a mixed question of fact and law is reviewed for clear error. An administrative decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577-78.

Unlike *Pullman-Standard*, where the rule of law was undisputed, this case presents solely questions of law. The Department and the appellate court each considered itself bound by this court's tangential discussion of the physical properties of electricity in *Farrand Coal Co. v. Halpin*, 10 Ill. 2d 507 (1957). In determining whether and to what extent *Farrand Coal* controls the outcome of the present case, this court has the power and the duty to reexamine the authorities and legal concepts invoked in that opinion. See *Bradley v. Fox*, 7 Ill. 2d 106, 111 (1955). As will be explained, every aspect of our analysis involves construing section 201(e) of the Income Tax Act. This a pure question of law and our review is *de novo*. See, *e.g.*, *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 214 (1994).

B. The Merits

Before this court, Exelon contends that it qualifies for the section 201(e) tax credit because it falls within the terms of the statute. Exelon alternatively contends that denial of the section 201(e) tax credit violates the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). It is quite established that this court will not address constitutional issues that are unnecessary for the disposition of the case. See, *e.g.*, *In re E.H.*, 224 Ill. 2d 172, 178 (2006) (collecting cases). As the Department correctly observed in its motion for summary judgment and at oral argument before this court, if Exelon qualifies for the section 201(e) tax credit as a matter of statutory construction, then there is no reason to reach the alternative constitutional issue. See, *e.g.*, *Mattis v. State Universities Retirement System*, 212 Ill. 2d 58, 74-75 (2004); *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 396 (1994).

1. "*Tangible* Personal Property"

To determine whether Exelon qualifies for the section 201(e) tax credit, we engage in a two-tier analysis. First, we analyze section 201(e) itself to determine the boundaries of the statute. Second, we determine whether section 201(e) applies in this particular case. See *Van's Material Co. v. Department of Revenue*, 131 Ill. 2d 196, 201-02 (1989); *Zenith Electronics Corp. v. Department of Revenue*, 293 Ill. App. 3d 651, 654 (1997).

The fundamental rule of statutory construction is to give effect to the intention of the legislature. A court's analysis begins with the language of the statute, which is the best indication of legislative intent. Where the statutory language is clear and unambiguous, the court must give it effect without resort to other tools of interpretation. In construing a statute, it is never proper for a court to depart from plain language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 556 (1999); *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181, 184-85 (1999). Absent statutory definitions indicating a different legislative intent, words in a statute are to be given their ordinary and popularly understood meaning. To ascertain the ordinary and popular meaning of words, this court sometimes uses the dictionary as a resource. *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill. 2d 1, 15 (1991); see *Gem Electronics of Monmouth, Inc. v. Department of Revenue*, 183 Ill. 2d 470, 477-78 (1998). Construing a statute is a pure question of law and our review is *de novo*. *City of Belvidere*, 181 Ill. 2d at 205.

Section 201(c) of the Income Tax Act imposes a "personal property tax replacement income tax" on "the privilege of earning or receiving income" in Illinois. 35 ILCS 5/201(c) (West 1994). Section 201(e) provides a credit against the personal property replacement income tax for investments in "qualified property." 35 ILCS 5/201(e) (West 1994).

The statute defines "qualified property," in pertinent part, as property "used in Illinois by a taxpayer who is primarily engaged in manufacturing, or in mining coal or fluorite, or in retailing." 35 ILCS 5/201(e)(2)(D) (West 1994). This section lastly provides: "For purposes of this subsection (e), the term 'retailing' means the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities." 35 ILCS 5/201(e)(3) (West 1994). The issue in this case is whether electricity is "tangible personal property." If so, then Exelon's business of selling electricity constitutes "retailing" as defined by section 201(e), thereby qualifying Exelon for the tax credit. The Income Tax Act does not define the term "tangible personal property."

The Department and the appellate court considered this court's analysis in *Farrand Coal* to be dispositive of Exelon's claim for a section 201(e) tax credit. In *Farrand Coal*, this court considered the meaning of the phrase "tangible personal property" in the context of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, ch. 120, par. 440 *et seq.*). In the Retailers' Occupation Tax Act at that time, as in the Income Tax Act before us, the legislature used the word "tangible" to define the term "retail" without defining the word "tangible." Assuming that the words had their ordinary and popular meaning, this court referred to Webster's, which defined "tangible" as:

> " 'Capable of being touched; also, perceptible to the touch; tactile; palpable.' [Citation.]

> The same dictionary gives the law definition of the term 'tangible property' as 'Corporeal property either real or personal' and defines 'corporeal' as meaning 'Of the nature of, consisting of, or pertaining to, matter or a material body; physical; bodily; material;–opposed to spiritual or immaterial *** Tangible or palpable.' " (Emphases omitted.) *Farrand Coal*, 10 Ill. 2d at 511, quoting Webster's New International Dictionary (2d ed. 1946).

This court has adhered to this definition of "tangible." See *First National Bank of Springfield v. Department of Revenue*, 85 Ill. 2d 84, 88 (1981). Exelon agrees with the Department and the appellate court that this definition of "tangible" should be used in construing section 201(e).

However, Exelon contends that neither the Department nor the appellate court conducted the second tier of the analysis this court described in *Van's Material*, which applies the definition of "tangible" to the facts of this case. Rather, according to Exelon, the Department and the appellate court relied on *Farrand Coal* in concluding, as a matter of law, that electricity is not tangible personal property. Indeed, the appellate court observed that it was "bound by the principle of *stare decisis* and must adhere to the decisions of our supreme court." 376 Ill. App. 3d at 922. Exelon assigns error to this conclusion. Exelon argues that *Farrand Coal* concerned the tangibility of coal, not electricity, and that this court's few comments regarding electricity were *dicta*.

Obiter dictum refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993); *Department of Public Works & Buildings v. Butler Co.*, 13 Ill. 2d 537, 545 (1958). As more fully stated: "A dictum is 'any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication.' " *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988), quoting *Stover v. Stover*, 60 Md. App. 470, 476, 483 A.2d 783, 786 (1984). There are several indications that a particular statement or passage in a prior opinion may be *dictum*:

> "One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion–it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered." *Crawley*, 837 F.2d at 292.

See *People v. Young*, 365 Ill. App. 3d 753, 770-71 (2006) (citing *Crawley*). In contrast, "an expression of opinion upon a point in a case argued by counsel *and deliberately passed upon by the court*, though not essential to the disposition of the cause, if

dictum, is a judicial *dictum*. [Citations.] And further, a judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous." (Emphasis added.) *Cates*, 156 Ill. 2d at 80. We agree with Exelon that this court's references to the tangibility of electricity in *Farrand Coal* were *obiter dicta*.

In *Farrand Coal*, the plaintiff coal company attempted to avoid paying sales tax imposed under the Retailers' Occupation Tax Act on the sale of coal to the city of Springfield, which operated an electric utility company. The coal company paid the sales tax under protest and sought to enjoin the Director of Revenue from collecting the payments. The circuit court dismissed the coal company's complaint, and the coal company appealed. *Farrand Coal*, 10 Ill. 2d at 507-08. The tax was payable on a sale of " 'tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property.' " *Farrand Coal*, 10 Ill. 2d at 510, quoting Ill. Rev. Stat. 1955, ch. 120, par. 440. The coal company characterized its sale of coal as a sale for resale not subject to sales tax. It argued that what it actually sold was not the coal itself, but rather the "energy" stored in the coal, and that the electric utility bought the "energy" in the coal to convert it to electric "energy" and resell it. The coal company alleged "that the energy sold by the utility is the same energy it purchased, though changed in form into electrical energy; that the energy in the coal constitutes an ingredient or constituent or material of the electrical energy." *Farrand Coal*, 10 Ill. 2d at 508.

This court viewed the issue presented in *Farrand Coal* as follows:

> "The basic issue to be resolved in determining this case is whether, under the act in question, *coal* is sold as tangible personal property to the utility for use or consumption and not for resale and is therefore the measure of a taxable retail sale, or whether energy, as tangible personal property, is bought in the form of *coal*, extracted therefrom, processed and resold as tangible personal property in the form of electrical energy." (Emphases added.) *Farrand Coal*, 10 Ill. 2d at 509-10.

This court made clear that the coal company's *coal* was the focus of the case and not the electric company's electricity:

> "It seems patently clear that plaintiff is engaged in the business of selling *coal* to utilities. Such *coal* constitutes tangible personal property within the popular meaning of that term as used in the act in question. The *coal* is used by the utility to generate electrical energy. Such use is by the burning or combustion of the *coal*. When burned, the *coal* is gone except for the ash residue. It is difficult to perceive how there could be a more complete use or consumption of the *coal* within the meaning of the act. Clearly plaintiff coal company has sold tangible personal property to the utility for use or consumption." (Emphases added.) *Farrand Coal*, 10 Ill. 2d at 513.

This was the dispositive reasoning of *Farrand Coal*. Indeed, affirming the circuit court, this court held: "*Coal* was sold as tangible personal property to the utility for use or consumption and not for resale within the meaning of the Retailers' Occupation Tax Act and is therefore the measure of a taxable retail sale." (Emphasis added.) *Farrand Coal*, 10 Ill. 2d at 513. In *Farrand Coal*, this court never had to–and never did–address definitively the issue of whether electricity is tangible.

The Department characterizes this view of *Farrand Coal* as "myopic." The Department argues that "whether electricity was tangible personal property was critical to the plaintiff's case." In *Farrand Coal*, the coal company included in its contention the following allegation and reasoning:

> "that the energy purchased by the utility and also the electrical energy sold by the utility are both tangible personal property; that since the energy purchased by the utility is tangible personal property and the same energy is resold by the utility to its customers, the energy is not used or consumed by the utility." *Farrand Coal*, 10 Ill. 2d at 508.

Therefore, according to the coal company, the sale of "energy" to the electric utility was not subject to sales tax. *Farrand Coal*, 10 Ill. 2d at 508-09.

The court in *Farrand Coal* rejected the coal company's arguments. The court observed:

> "From the evidence it appears that although energy and mass are closely

> interrelated, indestructible, equivalent, interchangeable, directly proportional to and may be equated with each other, yet energy as such cannot be separated from mass or matter and stored, weighed, transported, handled, liquified, solidified, photographed, touched or otherwise perceived by the senses in its own right or capacity separate and apart from mass or matter. All witnesses who testified on the subject, including plaintiff's witnesses, agreed that energy cannot be separated from matter and tagged or otherwise physically identified in any way, cannot be located spatially, and does not have dimensions. In all these respects energy falls short of fitting into the ordinary and popularly understood meaning of the word 'tangible' as used by the General Assembly in the act in question." *Farrand Coal*, 10 Ill. 2d at 511.

This court then concluded its analysis by focusing on the consumption of coal and not the tangibility of electricity. *Farrand Coal*, 10 Ill. 2d at 513.

However, in a three-paragraph passage, this court also recounted several cases in support of its observation that the court had "at no time held electricity to be 'tangible' personal property." *Farrand Coal*, 10 Ill. 2d at 512. This passage was *obiter dicta*. Since this court rejected the coal company's argument that energy was "trapped" in the coal, the court had no need to–and did not–deliberately consider whether electricity is "tangible." The passage refers to *Peoples Gas Light*

& Coke Co. v. Ames, 359 Ill. 152 (1934), in which this court concluded that a "decision as to whether or not electricity was tangible personal property was expressly declined as unnecessary to a disposition of the case." *Farrand Coal*, 10 Ill. 2d at 512. This court specifically mentioned *People v. Menagas*, 367 Ill. 330 (1937), in which this court held that electricity was personal property and, therefore, could be the object of larceny under the Criminal Code. The State "conceded" that electricity was intangible (*Menagas*, 367 Ill. at 332-33), and the court so assumed (*Menagas*, 367 Ill. at 338). The acknowledgment of an assumption does not constitute a holding. See 20 Am. Jur. 2d *Courts* §134, at 517 (2005) (stating that "a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced"). Lastly, the passage refers to *People ex rel. Mercer v. Wyanet Electric Light Co.*, 306 Ill. 377 (1922), in which this court held that "electric utility companies are neither manufacturing nor mercantile companies so as to have their capital stock assessed locally instead of by the State assessing authority." *Farrand Coal*, 10 Ill. 2d at 512. Indeed, this holding actually comports with our modern, common understanding of electric utility companies. An electric utility company is not a purely manufacturing or mercantile company. Rather, it belongs to that unique class of corporations known as public utilities. *Wyanet Light*, 306 Ill. at 380-81; see L. Hyman, A. Hyman & R. Hyman, America's Electric Utilities: Past, Present and Future 89 (7th ed. 2000) (explaining that an electricity supplier must

perform the following functions to deliver the product: production, marketing, transmission, distribution, metering and billing, and retail supply).

We reject the argument that this court's discussion of electricity in *Farrand Coal* was beyond mere *obiter dicta*. The above-referenced language in *Farrand Coal* was overly broad and not necessary to its holding. This three-paragraph passage was clearly unnecessary to the outcome of *Farrand Coal*. It was redundant in that it can be sloughed off without damaging the analytical structure of the opinion. See *Crawley*, 837 F.2d at 292. Further, the passage in *Farrand Coal* was not judicial *dictum*. Although this issue was briefed, this court did not deliberately rule upon the point. See *Cates*, 156 Ill. 2d at 80. Rather, the passage was uttered as an aside. See *Department of Public Works*, 13 Ill. 2d at 545.

Of course: "Even *obiter dictum* of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court." *Cates*, 156 Ill. 2d at 80. Therefore, in this case, it was reasonable for the appellate court to consider itself bound by this court's discussion of the tangibility of electricity in *Farrand Coal*. 376 Ill. App. 3d at 922.

However, in construing legislation that lacks statutory definitions, this court cannot ignore the laws of physics as humanity has come to understand them. See, *e.g.*, *Marzullo v. Kahl*, 366 Md. 158, 191, 783 A.2d 169, 188 (2001) (observing

that courts "do not set aside common experience and common sense when construing statutes").

In his recommended decision, the ALJ acknowledged that "neither party disputes the properties of electricity." The record in the present case contains the unrebutted affidavit and report of Dr. Fajans, entitled "The Physical Nature of Electricity." He defined electricity as the flow of electrons in a circuit. Dr. Fajans explained: "Electricity is physical and material because, microscopically, it consists of the flow and 'pressure' of a material entity, namely electrons, and macroscopically, it can be sensed (felt, tasted, seen, and heard), measured, weighed, and stored, and is subject to universal laws of nature." Dr. Fajans elaborated as follows:

> "Without electrons, electricity cannot be transmitted. Though electrons themselves are very small and lightweight, they are one of the basic constituents of matter; common matter like hydrogen or ion consists of electrons, protons, and neutrons in roughly equal number. Recently, scientists have been able to see electrons, or more precisely, the density of electrons, with devices called Scanning Tunneling Microscopes. *** There is nothing more physical and material than an electron. Since electricity itself consists of the flow of a material object, electricity is physical and material."

Dr. Fajans further explained that electricity can be felt:

> "You feel electricity every time you get a shock. Static shocks, from things like walking across a carpet on a dry day, are annoying, but almost always harmless. Electrical sensations from power lines range from the vibratory feeling that you may experience while gently running your fingertips over an improperly wired lamp, to the tingling feeling that you get if you touch the wires inside an electrical outlet with dry hands, to the strong twitch, pain and weakness you get from touching an outlet with wet hands, to extreme pain in more dangerous circumstances."

As a sister court observed: "The word 'intangible' from its Latin roots means something that cannot be touched or perceived by touch. [Webster's Third New International Dictionary 1173 (1993).] Electricity can be touched, and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she feels." *Utilicorp United Inc. v. Director of Revenue*, 75 S.W.3d 725, 728 n.6 (Mo. 2001). Dr. Fajans' report reflects the currently understood electron theory of electricity. See, *e.g.*, L. Hyman, A. Hyman & R. Hyman, America's Electric Utilities: Past, Present and Future 15-19 (7th ed. 2000); see generally S. Gibilisco, Teach Yourself Electricity and Electronics 3 (4th ed. 2006) (explaining: "It is important to understand some simple general physics principles in order to have a full grasp of electricity and electronics"); S. Herman, Delmar's Standard Textbook of Electricity (1993); D.

Bodanis, Electric Universe: The Shocking True Story of Electricity (2005) (tracing understanding of electricity from mysterious force to flowing electrons).

This court's *dicta* in *Farrand Coal* regarding the tangibility of electricity was based on our scientific knowledge of over half a century ago and was skewed by the true issue presented in that case. Our current understanding of electricity has progressed beyond that time. We need not address the parties' alternative statutory construction arguments. We now join the several courts that have expressly held in varying contexts that electricity constitutes "tangible personal property." See, *e.g.*, *Searles Valley Minerals Operations, Inc. v. State Board of Equalization*, 160 Cal. App. 4th 514, 521, 72 Cal. Rptr. 3d 857, 862 (2008); *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 97-98 (R.I. 2006); *Davis v. Gulf Power Corp.*, 799 So. 2d 298, 300 (Fla. Dist. Ct. App. 2001); *Curry v. Alabama Power Co.*, 243 Ala. 53, 59-60, 8 So. 2d 521, 526 (1942).[1]

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[1] Our construction of "tangible personal property" in section 201(e) of the Income Tax Act is based on our current understanding of the tangibility of electricity. Of course, the General Assembly may define this term to include or exclude electricity as it chooses. Where the legislature defines a particular statutory term, a court is bound by the definition as long as it is reasonable. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 275 (1998).

2. Is Exelon Primarily Engaged in "Retailing"?

The parties agree that if electricity is "tangible personal property," then Exelon would be engaged in "retailing" as defined by section 201(e). We have held that electricity is "tangible personal property" and, accordingly, hold that Exelon is a retailer as defined by section 201(e). The second tier of the analysis described in *Van's Material* concerns whether Exelon satisfies the statutory requirements for a section 201(e) tax credit. See *Van's Material*, 131 Ill. 2d at 201-02. The parties chose to litigate Exelon's claim by means of cross-motions for summary judgment, by which they agree that no factual issues exist and that the case presents only the need to resolve the legal issue. See, *e.g.*, *Board of Trustees of Southern Illinois University v. Department of Human Rights*, 159 Ill. 2d 206, 210 (1994); *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). Accordingly, our determination of that legal issue is conclusive.

In its petition for rehearing, the Department asks us to modify our opinion to render it only prospective to taxes incurred, or tax credits sought, for tax periods after the filing of this opinion. Generally, judicial decisions are given retroactive as well as prospective effect. *Deichmueller Construction Co. v. Industrial Comm'n*, 151 Ill. 2d 413, 416 (1992). However, this court has the inherent power to conclude that a decision will not apply retroactively, but only prospectively. *Deichmueller*, 151 Ill. 2d at 416; *Elg v. Whittington*, 119 Ill. 2d 344, 356-57 (1987). Whether a decision will be applied only

prospectively will depend on whether: (1) the decision establishes a new principle of law, either by overruling past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) given its purpose or history, the decision's operation will be impeded or promoted by prospective or retroactive application; and (3) a balance of the equities mandates prospective application. *Bogseth v. Emmanuel*, 166 Ill. 2d 507, 515 (1995); *Deichmueller*, 151 Ill. 2d at 417-18; *Elg*, 119 Ill. 2d at 357. Considering these factors in light of the instant facts, we limit our holding to an entirely prospective application.

First, we are deciding an issue of first impression where the resolution was not clearly foreseen. Albeit in *obiter dicta*, the above-discussed language in *Farrand Coal* suggested that electricity was intangible.

Second, retroactive application of our decision is not necessary to advance its purpose. The purpose of our holding is to ensure that the default legal meaning of the statutory phrase "tangible personal property" corresponds to its popularly understood meaning. Prospective application promotes the purpose of our holding by allowing the General Assembly to declare expressly its intent to include electricity if it uses the phrase "tangible personal property" in the future. See slip op. at 14 n.1.

Third, a balance of the equities likewise favors rendering this decision entirely prospective. Retroactive application of this decision could cause uncertainty in state tax law in general and as

applied to Exelon. Conversely, limiting this decision to an entirely prospective application permits the legislature to provide direction on the meaning of the statutory phrase "tangible personal property." Therefore, we hold that this decision will apply only prospectively to taxes incurred, or tax credits sought, for the tax year 2009 and thereafter. See, *e.g.*, *Bogseth*, 166 Ill. 2d at 515-17; *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 529-30 (1993).

"It remains the mandate of this court that constitutional issues be considered only when the case may not be decided on nonconstitutional grounds." *Mulay v. Mulay*, 225 Ill. 2d 601, 611 (2007). Our disposition of this cause obviates the need to determine whether the Department violated the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). See, *e.g.*, *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 185 (2003); *Bonaguro*, 158 Ill. 2d at 399.

III. CONCLUSION

We disagree with the appellate court's conclusion that Exelon did not engage in the sale of "tangible personal property" for purposes of section 201(e) of the Income Tax Act. However, because our holding is to be applied prospectively only, we affirm the judgment of the appellate court.

Affirmed.

JUSTICE BURKE took no part in the consideration or decision of this case.

JUSTICE THOMAS, specially concurring:

My colleagues are firmly convinced that they have the science of this issue correct. Unfortunately, science does not answer the question before the court, and the majority has its history and its law wrong. Consequently, I cannot join its opinion.

Two fundamental misunderstandings underlie and inform the majority opinion. The first is the mistaken belief that the central question we must resolve is whether a majority of this court believes that electricity is tangible at the subatomic level and *not* whether the legislature intended to include electricity within the meaning of "tangible personal property" when it enacted the tax credit in question. The Department has correctly and persuasively argued that the legislature could not have so intended. The second is a misunderstanding of *Farrand Coal* so profound that the majority can cast aside as *obiter dicta* this court's discussion of an issue that was (a) central to the plaintiff's case; (b) litigated in the trial court; and (c) fully briefed and argued on appeal. I will demonstrate below that such a position is not only indefensible but directly contrary to this court's precedents. After demonstrating why *Farrand Coal*'s discussion of the tangibility of electricity was not *obiter dicta*, I will set forth both why we should not abandon *Farrand Coal* and why the majority's reasons for doing so are wholly invalid.

I. *OBITER DICTA*

A. *Dicta* or Holding?

The majority correctly sets forth the distinction between *obiter dictum* and judicial *dictum*. In *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993), this court explained that *obiter dictum* is a "remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decicis* rule."[2] Slip op. at 8. "On the other hand, an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*." *Cates*, 156 Ill. 2d at 80. Because *obiter dicta* lies outside the *stare decisis* rule, the distinction between *obiter dicta* and judicial *dicta* is an important one. On the other hand, because judicial *dicta* has the force of a judicial determination and is entitled to much weight (*Cates*, 156 Ill. 2d at 80), the distinction between judicial *dicta* and a holding of the court is less important.

The majority, however, gives insufficient consideration to what discussions in opinions may

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[2] The majority states that it agrees with Exelon that this court's references to the tangibility of electricity in Farrand Coal were *obiter dicta*. Slip op. at 9. It should be noted, however that Exelon merely used the generic term *dicta* and did not state that the discussion was *obiter dicta*. The Department responded by arguing that the discussion was not *dicta*, but that, even if it was, it was judicial *dicta*.

not be considered *dicta* in the first place. A good summary appears in Corpus Juris Secundum:

> "An adjudication on any point within the issues presented by a case is not dictum. This rule applies as to all pertinent questions, although they might be only incidentally involved, which are presented and decided in the regular course of the consideration of the case, and lead to the final conclusion, and to any statement in the opinion as to a matter on which the decision is predicated. Accordingly, a point expressly decided does not lose its value as a precedent because the disposition of the case is or might have been made on some other ground. Similarly, if a case presents two or more points, any one of which is determinative of the ultimate issue, but the court actually decides all of them, the case is an authoritative precedent on every point decided, and none of the points may be regarded as dictum. One point should not be denied authority merely because another point was more fully argued and considered, nor does a decision on one proposition make statements of the court regarding other propositions dicta." 21 C.J.S. *Courts* §229, at 227 (2006).

With these principles in mind, let us now turn to *Farrand Coal*'s discussion of the tangibility of electricity.

At issue in *Farrand Coal* was the desire of the plaintiff coal company not to pay the retailers'

occupation tax. The coal company was being taxed on its sales of coal to an electric utility. The tax in question was imposed "upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." See *Farrand Coal*, 10 Ill. 2d at 510. The statute defined "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption *and not for resale in any form as tangible personal property*." (Emphasis added.) Ill. Rev. Stat. 1955, ch. 120, par. 440. The statute further provided that, "Sales of tangible personal property, which property as an ingredient or constituent goes into and forms *a part of tangible personal property subsequently the subject of a 'sale at retail'*, are not sales at retail as defined in this Act." (Emphasis added.) Ill. Rev. Stat. 1955, ch. 120, par. 440. The position of the Department was that the coal company was selling tangible personal property (coal) to the electric utility for use or consumption, and, consequently, it was required to pay the tax. The coal company argued that it was exempt from paying the tax under the statute's exception for tangible personal property resold by the purchaser. The coal company argued that the energy in the coal that it sold to the utility was resold by the utility as tangible personal property–electric energy. In its brief in *Farrand Coal*, the Department summarized what would be necessary for the coal company to prevail:

> "For the plaintiff to prevail, it must be determined: First, that energy is tangible personal property; second, that electrical

> energy is merely a modified form of energy which can be proved to have been extracted from the coal, *and third that the transaction between the utility and its customers actually is a sale of electrical energy as tangible personal property* and not merely the selling of the work and service which the electrical energy can perform and furnish. Failure by the plaintiff to establish any one (not all, but any one) of these points will defeat the plaintiff's whole case and make a decision in the defendants' favor necessary." (Emphasis added.) *Farrand Coal*, defendant's brief at 61.

Consequently, both the plaintiff and the defendants presented extensive scientific testimony on the issues of whether energy and electricity are tangible personal property. The experts for the plaintiff included an associate professor of physics from Purdue University, a Ph.D. in physics in the institute for nuclear studies at the University of Chicago, a second physics professor from the University of Chicago, and the general superintendent for the utility, who was an engineering graduate from Purdue. The defense witnesses included a professor of physics from the University of Illinois and a professor of mining and metallurgical engineering from Washington University. *Farrand Coal*, 10 Ill. 2d at 509. The scientific testimony covered the better part of two full days. *Farrand Coal*, 10 Ill. 2d at 509. The plaintiff and the defendants disagreed as to whether: (1) electrical energy is merely energy in

coal in a changed form; and (2) electricity is tangible personal property. *Farrand Coal*, 10 Ill. 2d at 509. The briefs cover in great detail the scientific testimony offered on whether energy and electricity are tangible personal property, and the parties presented extensive appellate arguments on these points.

It is not necessary, however, for one to have read the briefs in *Farrand Coal* to understand that this court's discussions of the tangibility of energy and electricity were not *dicta*. After all, *Farrand Coal* set forth the statute in question. See *Farrand Coal*, 10 Ill. 2d at 510. Moreover, it detailed the coal company's argument that the electric energy sold by the utility was tangible personal property. See *Farrand Coal*, 10 Ill. 2d at 508. It also set forth that the coal company's theory of the case was that "energy, as tangible personal property, is bought in the form of coal, extracted therefrom, processed and resold as tangible personal property in the form of electrical energy." *Farrand Coal*, 10 Ill. 2d at 509-10. Thus, it is apparent from the face of the decision that a showing that the electric utility was selling tangible personal property to its customers was essential to the coal company's claim and that the point was argued by the parties. Indeed, had the coal company not argued that the electric utility was selling tangible personal property to its customers, the Department would have been entitled to a judgment on that basis alone.

The *Farrand Coal* court ultimately addressed all parts of the parties' claims. The court agreed with the Department that the coal company sells

tangible personal property (coal) to the utility and that the coal is used or consumed by the utility. *Farrand Coal*, 10 Ill. 2d at 513. The court rejected plaintiff's arguments that it is really selling energy in the coal and that the energy is resold as electric energy by the utility. *Farrand Coal*, 10 Ill. 2d at 513. The court explained that (1) energy is intangible (and this holding would necessarily encompass electric energy) (*Farrand Coal*, 10 Ill. 2d at 511); (2) energy cannot be separated from matter (*Farrand Coal*, 10 Ill. 2d at 511); and (3) the electric utility is not selling tangible personal property to its customers (*Farrand Coal*, 10 Ill. 2d at 512-13).

Accordingly, there is no possible basis for casting aside this court's discussion of any of these issues as merely comments made "by the way" or as asides. Rather, they were points essential to the case, deliberately argued by counsel, and passed upon by the court. Every point that the court discussed in *Farrand Coal* was directly relevant to whether the exception for tangible personal property resold by the purchaser was applicable. Consequently, no part of the court's opinion may be considered *dicta*, even if any one of the points discussed could have alone supported the court's decision. 21 C.J.S. *Courts* §229, at 227 (2006); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 93 L. Ed. 1524, 1526, 69 S. Ct. 1235, 1237 (1949).[3]

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[3] The majority attempts to downplay the significance of the tangibility of electricity discussion by twice referring to it as a "three-paragraph passage." Slip op. at 11, 12. It should be noted that this was the longest discussion in *Farrand Coal*.

The majority supports its erroneous conclusion that this passage from *Farrand Coal* was *dicta* by selectively quoting from a Seventh Circuit opinion, *United States v. Crawley*, 837 F.2d 291 (7th Cir. 1988). According to the majority, the discussion of the tangibility of electricity was not "necessary" to the outcome of the case because it could be sloughed off without damaging the analytical structure of the opinion. Slip op. at 12. There are several problems with this assertion. First, a fuller statement of the principle the majority is thinking of is that *dicta* is "an opinion expressed by a judge on a point not necessarily arising in the case, or a statement in an opinion *not responsive to any issue* and not necessary to the decision of the case." (Emphasis added.) 21 C.J.S. *Courts* §227, at 224-25 (2006). Second, far from supporting the majority's conclusion, *Crawley* shows why the majority's understanding of *dicta* is incorrect. In *Crawley*, the Seventh Circuit considered whether a prior opinion had changed the standard of proof in probation-revocation cases. The court had consistently held that the court could revoke probation if reasonably satisfied that the probationer had violated a condition of his probation. In one opinion, *United States v. Yancey*, 827 F.2d 83 (7th Cir. 1987), the

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See *Farrand Coal*, 10 Ill. 2d at 510-13. Moreover, the majority neglects to mention that by focusing on these three paragraphs, it is leaving out: (1) the express holding that energy is intangible (*Farrand Coal*, 10 Ill. 2d at 511); and (2) the express holding that the sale of electrical energy by a utility is not a sale at retail of tangible personal property (*Farrand Coal*, 10 Ill. 2d at 513).

court stated that the proof in the case satisfied the preponderance of the evidence standard. In subsequent cases, the court continued to apply the "reasonably satisfied standard." Rather than simply stating that the statement in *Yancey* was a mistake or that later decisions controlled, the court endeavored to demonstrate that *Yancey*'s statement was *dicta*. The court listed several definitions of the word *dicta*, including that *dicta* is " 'a statement *not addressed to the question before the court* or necessary for its decision.' " (Emphasis added.) *Crawley*, 837 F.2d at 292, quoting *American Family Mutual Insurance Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175, 178 (1984). The court also stated that " '[t]he basic formula [for distinguishing holding from *dictum*] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them.' " *Crawley*, 837 F.2d at 292, quoting *United Steelworkers of America, Local 8599 v. Board of Education of the Fontana Unified School District*, 162 Cal. App. 3d 823, 834, 209 Cal. Rptr. 16, 21 (1984). The court then stated that a different approach for identifying *dicta*, since the definitions are inconsistent, is to ask what is at stake in the definition. The court then adopted the following approach:

> "What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. So instead of asking what the word 'dictum' means we can ask

> what reasons there are against a court's giving weight to a passage found in a previous opinion. There are many. One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion–it can be sloughed off without damaging the analytical structure of the opinion, and so *it was a redundant part of that opinion* and, again, may not have been fully considered. *Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation.* All these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement, that it was not likely to be relied on by readers, and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court)." (Emphases added.) *Crawley*, 837 F.2d at 292-93.

The court ultimately concluded that *Yancey*'s statement about the preponderance standard was *dicta* because the issue of the proper standard *had not been raised in that case* and, since the evidence

satisfied the higher preponderance standard, the court had no occasion to consider whether the defendant's probation should have been revoked based on the lower "reasonably satisfied" standard. Thus, the court was dealing with a single sentence on an issue that had not been briefed or argued. What in the above discussion suggests that the Seventh Circuit would consider as *dicta* a discussion that was not only the longest discussion in an opinion but also addressed an issue that was (1) fully briefed by the parties (even more extensively than in the present case); (2) directly relevant to whether the statute applied; (3) essential to the plaintiff's case, and (4) the only part of the discussion that grounded the court's analysis in the court's precedents? The discussion to which the majority refers was *not* redundant and removing it absolutely would have damaged the analytical structure of the opinion. If we ignore for the moment the fact that "sloughing off" this analysis would *still* leave the holdings that energy is intangible and that electric utilities are not retailers of tangible personal property intact, without this analysis, none of the court's precedents would have been discussed. The court obviously considered it important to point out that the coal company's arguments had no support in this court's precedents and that all contrary out-of-state authority on the issue was distinguishable.

Moreover, the majority's view of what it means for something to be "necessary" for a court's decision would necessarily render vast amounts of supreme and appellate court case law mere *dicta*.

According to the majority, the discussion of the tangibility of electricity or electrical energy was *dicta* because the court had already given another reason for holding that the statutory exception did not apply. Slip op. at 11. But this would necessarily mean that in *every* case in which a court gives more than one reason for its holding, only the first reason would be a judicial determination and all other reasons would be mere *dicta*. Not only is this not the law (see *Woods*, 337 U.S. at 537, 93 L. Ed. at 1526, 69 S. Ct. at 1237 ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924) (same); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 72 L. Ed. 303, 48 S. Ct. 194 (1928) (reason for court's conclusion is not *obiter dictum* merely because another reason was more fully argued and considered)), it is terrible as policy. The majority's position will mean that a court wishing to give several reasons for its holding will either have no incentive to do so or will not be able to list the reasons in the most logical sequence. Rather, the court will have to choose what reason it wants to be binding precedent and put that discussion first.

It appears that the majority might be confusing the analysis in *Farrand Coal* with the situation in which the resolution of one issue substantively precludes resolution of the other. Corpus Juris Secundum gives two examples of what it means for a court's discussion to be unnecessary to the decision:

> "For instance, once a court determines that a statute does not apply to a case, any statement concerning the statute's constitutionality is dictum. Similarly, when a court dismisses a case for lack of jurisdiction, any further discussion of the merits is dictum." 21 C.J.S. *Courts* §227, at 225 (2006).

This makes perfect sense. A court cannot rule on the constitutionality of a statute that is not before it, nor can the court rule on the merits of a case over which it lacks jurisdiction. But there is no reason why a court may not give several reasons why a statute does not apply to a case, and there is no "one and done" rule rendering every reason after the first one *obiter dicta*. The majority bases its *dicta* holding not on any legitimate substantive reason, but simply on the manner in which Justice Bristow chose to structure his opinion.

In sum, there is no *dicta* in *Farrand Coal*. The court's opinion in that case is a concise, to-the-point analysis, giving several reasons why the statutory exception for tangible personal property resold by the purchaser does not apply. Every sentence in the court's opinion is directly relevant to that issue and is responsive to a point put in contention by the parties.

B. Judicial *Dicta* or *Obiter Dicta*?

Even if we assume for the sake of argument that the court's discussion of the tangibility of electricity was *dicta*, for all of the reasons set forth above, it

could only be judicial *dicta*. As this court explained in *People v. Williams*, 204 Ill. 2d 191, 206 (2003):

> "*Dicta* normally comes in two varieties: *obiter dicta* and judicial *dicta*. *Obiter dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case. Black's Law Dictionary 1100 (7th ed. 1999). Judicial *dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. Black's Law Dictionary 465 (7th ed. 1999)."

Or, as stated in *Cates*, the relevant question in determining whether dicta is *obiter dicta* or judicial *dicta* is to what extent the issue was before the court. *Cates*, 156 Ill. 2d at 81. The tangibility of electricity could not have been more central or relevant to the issue in *Farrand Coal*, and the issue was litigated in the trial court and briefed extensively on appeal.

The majority does not attempt to argue that this issue was not before the court in *Farrand Coal*. Instead, the majority seizes on the statement in *Cates* that judicial *dicta* is an expression of an opinion on a point argued by the parties and *deliberately passed upon* by the court, but not essential to the disposition of the case. *Cates*, 156 Ill. 2d at 80. The majority claims that the issue was not "deliberately passed upon," and therefore the discussion was not judicial *dicta*. To reiterate: in *Farrand Coal*, this court held that energy is intangible. *Farrand Coal*, 10 Ill. 2d at 511. This holding necessarily applies to electrical energy. The

defendants in *Farrand Coal*, when arguing that electrical energy is intangible, incorporated by reference their arguments about energy in general, noting that "if energy is intangible, electric energy (which is just a form of energy) is necessarily intangible. *Farrand Coal*, defendants' brief at 35-36. The court then explained that any argument that electricity is tangible finds no support in this court's case law and all out-of-state opinions holding it to be tangible are distinguishable. *Farrand Coal*, 10 Ill. 2d at 512. The court summed up by holding that the sale of electrical energy by an electric utility is not a sale at retail of tangible personal property. *Farrand Coal*, 10 Ill. 2d at 513. So, according to the majority, holding that all energy is intangible, that any argument that electricity is tangible finds no support in this court's case law, that all out-of-state cases that hold electricity to be tangible are distinguishable, and that the sale of electrical energy is not a sale at retail of tangible personal property is not "deliberately passing" upon the question. Clearly, *obiter dicta* is now whatever this court wants it to be. Should it be any surprise that *no* court to consider *Farrand Coal* thought that this court was merely making comments as asides when it addressed this question? See *Waukegan Community Unit School District No. 60 v. City of Waukegan*, 95 Ill. 2d 244, 253 (1983) (citing *Farrand Coal* for the proposition that public utilities are in the business of rendering a service rather than in selling tangible personal property); 376 Ill. App. 3d at 921-23 (*Farrand Coal* classified electricity as intangible property); *Electric Energy,*

Inc. v. Hamer, 373 Ill. App. 3d 733, 736 (2007) (citing *Farrand Coal* for the proposition that "the sale of electricity is the sale of a service"); *Union Coal Co. v. Department of Revenue*, 38 Ill. App. 3d 293, 294 (1976) ("In the *Farrand* case the court held an electric utility company does not sell tangible personal property when it sells electricity or electrical energy"). Ironically, it appears that the majority believes that *Farrand Coal* passed upon the question too. The majority states that it was reasonable for the appellate court to consider itself bound by *Farrand Coal* (slip op. at 12), but that we are now abandoning that case because our scientific understanding has progressed since that case was decided (slip op. at 14). These statements make sense only if *Farrand Coal* did pass upon the question.

Because there is *no* legitimate debate as to whether this court's discussion of the tangibility of electricity was "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court" (*Cates*, 156 Ill. 2d at 80), the majority opinion represents a clear and unequivocal repudiation of *Cates* and its progeny. Clearly, there is no longer a distinction in Illinois between judicial *dicta* and *obiter dicta*. Because the distinction that *Cates* drew is an important and valid one that has been applied by this court and other courts for years, I believe that any overruling of this precedent should be explicit and include a discussion of why it is appropriate to depart from *stare decisis*. *Cates* is too important and well established to be overruled *sub silentio*.

C. What *Farrand Coal* Was Not About

Next, I must briefly point out what was *not* the issue in *Farrand Coal*. The majority notes that Exelon argues that *Farrand Coal* concerned the tangibility of coal, not electricity. Slip op. at 8. Because the majority does not repudiate this obviously false statement, it is unclear if this argument influenced the majority's erroneous conclusion that the discussion of the tangibility of electricity was *dicta*. *Of course* the issue in *Farrand Coal* was not whether coal is tangible. In the first place, who would argue that coal is *in*tangible? Such an assertion would be preposterous on its face and almost certainly would never be the focus of a supreme court opinion. In fact, such a position would be so absurd that even anyone who had never read *Farrand Coal* would have a pretty good idea that this could not have been the issue in that case.

Second, *why* would anyone have argued that coal is intangible? Such a position would have been fatal to both parties' cases. Both parties needed coal to be tangible for their arguments to succeed. The Department wanted to tax the plaintiff on the basis that its sale of coal was a sale of tangible personal property. In the coal company's effort to avoid paying this tax, it argued that its sale of tangible personal property was actually a sale of the energy in the coal. The coal company argued that if we start out with something tangible–coal–then whatever makes up the coal must also be tangible. Thus, the energy in the coal is tangible. *Farrand Coal*, plaintiff's brief at 25. The tangibility

of coal was assumed and conceded by both parties as a necessary component of their respective positions, and the issue before the court was *not* whether coal is tangible. If this was indeed the true issue in *Farrand Coal*, it is interesting that it was never discussed in the opinion. See *Farrand Coal*, 10 Ill. 2d at 510-13.

Regardless of whether *Farrand Coal*'s discussion of the tangibility of electricity was a holding or judicial *dicta*, it is entitled to much weight and any departure therefrom requires a discussion of *stare decisis*. I will next discuss why compelling reasons exist not to depart from this court's precedents, following which I will demonstrate that the majority's reasons for doing so cannot survive a moment's scrutiny.

II. *STARE DECISIS*

The principles underlying *stare decisis* were well stated by Justice Freeman in his impassioned dissent in *People v. Mitchell*, 189 Ill. 2d 312 (2000):

> "The term *stare decisis* is derived from the Latin phrase *stare decisis et non quieta moevre*, which translates ' "to stand by matters that have been decided and not to disturb what is tranquil." ' J. Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 Buff. L. Rev. 187, 189 (1994), quoting Dictionary of Foreign Phrases and Abbreviations 187 (K. Guinach trans., 3d ed. 1983). This principle was engrafted in

English jurisprudence, having been recognized by Sir William Blackstone, who acknowledged that ' "precedents and rules must be followed, unless flatly absurd or unjust." ' J. Stein, *The Hobgoblin Doctrine: Identifying 'Foolish' Consistency in the Law*, 29 Tex. Tech. L. Rev. 1017, 1019 (1998) quoting 1 W. Blackstone, Commentaries *70. In American jurisprudence, *stare decisis* reflects a ' "policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " ' *State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 212-13, 118 S. Ct. 275, 284 (1997), quoting *Agostini v. Felton*, 521 U.S. 203, 235, 138 L. Ed. 2d 391, 422, 117 S. Ct. 1997, 2016 (1997), quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 76 L. Ed. 815, 823, 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting, joined by Roberts and Cardozo, JJ.). As the United States Supreme Court has observed, the judiciary prefers this doctrine because it 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2609 (1991).

This court, too, has voiced similar sentiments. Long ago in *Prall v. Burckhartt*,

the court observed that the rule of *stare decisis*

> 'is founded largely on considerations of expediency and sound principles of public policy, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument, and the courts are slow to interfere with the principle announced by the decision and it may be upheld even though they would decide otherwise were the question a new one.' *Prall v. Burckhartt*, 299 Ill. 19, 41 (1921).
>
> In light of the foregoing, this court has recognized that the doctrine, while not inviolable, demands that it be overturned 'only on the showing of good cause.' *Heimgaertner v. Benjamin Electric Manufacturing Co.*, 6 Ill. 2d 152, 167 (1955)." *Mitchell*, 189 Ill. 2d at 363-64 (Freeman, J., dissenting, joined by Harrison, C.J., and McMorrow, J.).

Moreover, as both the United States Supreme Court and this court have explained, *stare decisis* considerations are at their apex in statutory construction cases. In *Neal v. United States*, 516 U.S. 284, 295-96, 133 L. Ed. 2d 709, 719-20, 116 S. Ct. 763, 769 (1996), the Supreme Court stated the following:

> "Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.' *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). Absent those changes or compelling evidence bearing on Congress' original intent, *NLRB v. Longshoremen*, 473 U.S. 61, 84 (1985), our system demands that we adhere to our prior interpretations of statutes. *** True, there may be little in logic to defend [the statutory construction] ***. Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."

In *Froud v. Celotex Corp.*, 98 Ill. 2d 324, 336 (1983), this court stated that "[c]onsiderations of *stare decisis* weigh more heavily in the area of

statutory construction *** because such a departure *** amounts to an amendment of the statute itself rather than simply a change in the thinking of the judiciary with respect to common law concepts which are properly under its control."

This case presents a textbook example of when a court should follow *stare decisis*. As the Department explained in its brief:

> "The transfer or sale of tangible personal property has been a term of art in Illinois tax law for seventy-five years. When the Illinois legislature passed the Retailers' Occupation Tax Act (ROTA) in 1933, it defined a retail sale as the 'transfer of the ownership of ... tangible personal property ... for use or consumption ... for a valuable consideration.' Laws 1933, p. 924 §1 (*presently codified, as amended*, at 35 ILCS 120/1 (2006)). This definition remains substantively unchanged. *Id.* When the legislature subsequently defined 'retailing' in the Investment Tax Credit as the sale of tangible personal property, it used an operative phrase that has been included in the definition of retailing for over seven decades, *compare* 35 ILCS 120/1 (2006) *with* 35 ILCS 5/201(e)(3) (2006), and which has an established legal meaning in Illinois tax law. *See, e.g., Schwak v. Zehnder*, 326 Ill. App. 3d 752, 756, 761 N.E.2d 192 (1st Dist. 2001) (holding that terms used in Investment Tax Credit had same meaning as same terms used in Use Tax and Retailers Occupation Tax Acts).

* * *

> In short, the tax treatment of electricity is a well-trod area of Illinois law. In a series of cases dating back decades and extending to the present, this court and the Illinois Appellate Court have established that although electricity is property, it is not sold at retail as 'tangible personal property,' but rather provided as part of a service. Consequently, those who provide electricity services are not subject to taxes imposed on retailers and retail sales, nor are they entitled to credits and exemptions reserved for retailers. The appellate court correctly presumed 'that the legislature acted with knowledge of this prevailing case law' when it used the well-established definition of retailer in the Investment Tax Credit." Defendants' brief at 9-10, 14.

In addition to the fact that the Illinois courts' treatment of this issue has been consistent for decades, the Department also points out that we have clear evidence that the legislature knows that the courts have declared that electricity is not included within the term "tangible personal property" and that therefore electricity must be specifically mentioned if the legislature intends to include it. *Farrand Coal* was decided in 1957. In 1969, the legislature amended section 5 of the Public Utilities Revenue Act (Pub. Act 76–964, approved August 26, 1969 (now 35 ILCS 620/5 (West 2006))). This section incorporates portions of the Retailers' Occupation Tax Act into the Public

Utilities Revenue Act. Because under *Peoples Gas Light & Coke Co.* and *Farrand Coal* electric utilities were not retailers as a matter of law, the legislature explained that "[r]eferences in such incorporated Sections of the Retailers' Occupation Tax Act to sales of tangible personal property mean the distributing of electricity *when used in this Act.*" (Emphasis added.) 35 ILCS 620/5 (West 2006). In contrast, when the legislature enacted the tax credit in question in 1982, the legislature simply used the term "tangible personal property" without any additional language incorporating electricity. See 35 ILCS 5/201(e) (West 2006). Consequently, we must presume that the legislature did not intend for the term "tangible personal property" to include electricity when it enacted the investment tax credit.

Although the majority acknowledges that "[t]he fundamental rule of statutory construction is to give effect to the intention of the legislature" (slip op. at 6), it never explains how it can possibly conclude, given interpretations of tax law dating back to the 1930s that electric utilities are engaged in the selling of a service and are not retailers of tangible personal property, and given the evidence we have that the legislature is aware of these interpretations and has acted in reliance on them, that the legislature intended to include electricity in the definition of "tangible personal property" in

the statute in question.[4] The majority helpfully informs the legislature in a footnote (see slip op. at 14 n.1) that it may now define "tangible personal property" to include or exclude electricity as it chooses, but ignores the fact the legislature has *already* done this based on our previous definition. That is why it is now the proper role of the judiciary to stay out of the matter. See *Neal*, 516 U.S. at 295-96, 133 L. Ed. 2d at 719-20, 116 S. Ct. at 769. The trial court had it exactly right when it stated in its order: "If Exelon wishes to seek changes to the statute, it should take the matter up with the legislature."

In sum, given the Illinois courts' consistent holdings that electric utilities are not retailers of tangible personal property, and given the evidence that the legislature is aware of this case law and has acted in reliance on it, we should adhere to our precedent even if five members of this court now disagree with it and wish that those cases had been decided differently. The legislature already has its definition and it has been free to include electricity as it sees fit. This is a clear example of a situation in which it is more important that the law be settled than that it be settled right.[5] At one point in

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[4] This is the principal argument raised by the Department before this court, and the majority has chosen not even to acknowledge it, let alone address it.

[5] That this is a question that can ever be settled "right" is certainly debatable, as courts are still holding to this day that electricity is *not* tangible personal property. See, *e.g.*, *XO New York, Inc. v. Commissioner of Taxation & Finance*, 856 N.Y.S.2d 310, 51 A.D.3d 1154 (2008); *Omaha Public Power*

its opinion, the majority states that "in construing legislation that lacks statutory definitions, this court cannot ignore the laws of physics as humanity has come to understand them." Slip op. at 12. I have not previously seen this canon of statutory construction, but, assuming that it is valid, is it not also true that, in construing statutes that lack statutory definitions, this court cannot ignore *its previous interpretations of those statutory terms as the legislature has come to understand them*? And if these are both valid considerations why would the latter not be of paramount importance to a reviewing court?

Let us now turn to the majority's reasons for abandoning *Farrand Coal*.

III. THE MAJORITY'S NOT-SO-NEW SCIENCE

Although the majority does not acknowledge that it is bound by *stare decisis*, it does give reasons for abandoning this court's previous decisions. The majority has chosen to overturn decades of this court's precedents on the basis of the affidavit filed by Dr. Fajans. According to the majority, Dr. Fajans' affidavit reflects the "currently understood electron theory of electricity." Slip op. at 13. The majority then cites three textbooks on electricity and explains that they trace the "understanding of electricity from mysterious force to flowing electrons." Slip op. at 13. The majority also consults

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District v. Nebraska Department of Revenue, 248 Neb. 518, 537 N.W.2d 312 (1995).

a Teach Yourself Electricity and Electronics textbook and cites it for the proposition that " '[i]t is important to understand some simple general physics principles in order to have a full grasp of electricity and electronics.' " Slip op. at 13, quoting S. Gibilisco, Teach Yourself Electricity and Electronics 3 (4th ed. 2006). The majority then explains its belief that *Farrand Coal* was based on our "scientific knowledge of over half a century ago," and states that we should depart from that decision because "[o]ur current understanding of electricity has progressed beyond that time." Slip op. at 14. The portions of Dr. Fajans' affidavit relied on by the majority are his statements that (1) electricity is made up of a material entity–electrons; (2) electricity can be felt, tasted, seen, heard, measured, weighed, and stored, and is subject to the laws of nature; and (3) electricity can be touched or felt because a person may receive a shock from electricity. Slip op. at 12-13. In sum, the majority's reason for departing from our precedent is that this court's scientific understanding of electricity has progressed since *Farrand Coal* was decided in 1957, and that the points that we now understand that this court did not understand in 1957 are reflected in the highlighted portions of Dr. Fajans' affidavit. A brief history lesson is in order.

The electron in its present-day sense was discovered by the English physicist J.J. Thomson in 1897. 8 Collier's Encyclopedia 788 (1997). However, even before Thomson's discovery, Michael Farrady had discovered by 1833 that electricity was not a continuous fluid but was carried in discrete pieces.

8 Collier's Encyclopedia 787-88 (1997). Other important discoveries about electrons continued throughout the next few decades:

> "The Bohr atom (1913) was the first attempt to describe the behavior of an electron in an atom. Louis Victor de Broglie's idea (1924) on the wave nature of the electron (verified experimentally by Clinton Joseph Davisson and Lester Halbert Germer in 1927) was developed into wave mechanics by Erwin Schrodinger in 1926. Simultaneously, the spin of the electron was deduced by Samuel A. Goudsmit and George E. Uhlenbeck (1925) from various features of atomic spectra. The correct wave equation for the electron was given by Paul A.M. Dirac (1928). The Dirac equation is consistent with special relativity and correctly describes the electron's spin and magnetic moment (aside from radiative corrections)." 8 Collier's Encyclopedia 788 (1997).

The Dirac equation predicted the existence of positive electrons, or positrons, and positrons were found in cosmic rays by Carl D. Anderson in 1932. 8 Collier's Encyclopedia 788 (1997).

Shortly after these discoveries, the question of the tangibility of electricity began to be litigated in Illinois courtrooms and elsewhere. In 1934, Time magazine reported on the trial court proceedings that would form the basis for this court's decision in *Peoples Gas Light & Coke Co. v. Ames*, 359 Ill. 152 (1934):

"In his Chicago courtroom last week Circuit Judge Harry M. Fisher stared at a voltmeter which had been placed before him on the bench. The voltmeter was connected to a switch, and the switch was connected with the courtroom lights. When the switch was closed Judge Fisher saw the voltmeter needle leap from 0 to 110 on the dial. What he had to decide was whether the thing that made the needle leap was tangible or intangible. There to help him, but arguing on opposite sides of the dispute, were two distinguished Nobel Prizemen.

Point at issue was whether electric current was subject to Illinois 2% Occupation tax. Twenty power companies headed by Commonwealth Edison, Peoples Gas Light & Coke, and Central Illinois Public Service contended that current was an intangible, hence nontaxable. The State contended that current was a tangible and taxable commodity. The companies stood to lose in taxes, the State to gain in revenue, some $5,000,000 annually.

No one attacked the orthodox teaching of physics that electric current is a flow of matter having mass. A current of one ampere is a flow of 6,281 billion billion electrons per second past a given point. An electron is a particle of matter weighing 0.8999 billionths of a billionth of a billionth of a gram. But was electric current tangible?

> Up rose beetle-browed Dr. Arthur Holly Compton (Nobel Prize, physics, 1927). Electricity was tangible, said he, because it could be seen, heard, felt, tasted.
>
> Up rose wiry, tousle-haired Dr. Irving Langmuir (Nobel Prize, chemistry, 1932). Electricity was intangible, said he, because it could not be seen, heard, felt, tasted.
>
> Circuit Judge Fisher watched, listened, pondered. Then, he solemnly pronounced electricity a tangible, taxable commodity." *Electricity in Court*, Time (July 30, 1934).

When the case ultimately reached the supreme court, this court decided that it did not have to determine whether or not electricity was tangible because public utilities are in the business of rendering a service. *Peoples Gas Light & Coke Co.*, 359 Ill. at 158-61. The Retailers' Occupation Tax Act was intended to apply only to those who are in the business of selling tangible personal property for use or consumption, and utilities are in the business of rendering a service. *Peoples Gas Light & Coke Co.*, 359 Ill. at 158.

In *People v. Menagas*, 367 Ill. 330 (1937), this court considered whether a theft of electric current was covered by the larceny statute. The court received testimony from an electrical engineer who explained that electricity is the motion of electrons, and that an electron is the smallest unit of matter reasonably and accurately known to science. *Menagas*, 367 Ill. at 331. This court held that, although electrical energy is intangible, it can be

measured, stored, and carried off. *Menagas*, 367 Ill. at 333. The court ultimately decided that the relevant test for whether something could be the subject of a larceny was whether it could be taken and carried away. Because electrical energy fell within this test, it was covered by the larceny statute, even though it was intangible. *Menagas*, 367 Ill. at 338.[6] The court further explained that this holding was in no way inconsistent with cases such as *Peoples Gas Light & Coke Co.*, which had held that, for purposes of tax statutes, utilities are engaged in service rather than selling. *Menagas*, 367 Ill. at 338.[7]

In 1942, the Supreme Court of Alabama took up the question of whether electricity is tangible personal property. In *Curry v. Alabama Power Co.*, 243 Ala. 53, 8 So. 2d 521 (1942), the issue was

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[6] The *Menagas* court twice referred to electrical energy as intangible and never stated that it was simply "assuming" it to be so, and the record before the court contained expert testimony explaining that electricity is the flow of a material entity–electrons. However, even if this was just an assumption, that hardly seems problematic in light of *Farrand Coal*'s *express holding* that energy is intangible.

[7] This court's categorization of electricity as intangible for purposes of theft statutes would remain just as consistent as our categorization of electricity as intangible for purposes of tax statutes. In 2007, this court, in discussing the reach of the theft statute, stated that "the legislature intended to expand the definition of property to include *not only* items of tangible personal property *but also* other things of value such as real estate, *electricity*, and telecommunications services." (Emphases added.) *People v. Perry*, 224 Ill. 2d 312, 328 (2007).

whether the power company was required to pay taxes under the Alabama Use Tax Act. Resolving this issue required the court to consider whether electricity is tangible personal property. Expert testimony was received on this question, and typical of the testimony was that of Dr. K.B. McEachron, who explained that electricity is a flow of electrons, that electricity has mass or weight, that it may be perceived by the senses in that it may be tasted, felt, and touched. *Curry*, 243 Ala. at 56, 8 So. 2d at 522-23. Ultimately, the court determined that it did not have to decide the issue because the legislature had defined electricity as tangible personal property within the meaning of the Use Tax Act. *Curry*, 243 Ala. at 60, 8 So. 2d at 526. Nevertheless, the court decided to weigh in on the question and determined that electricity is tangible.[8] The court determined that the meaning of tangible, according to Webster's, is " 'capable of being touched, also perceptible to the touch, palpable.' " *Curry*, 243 Ala. at 59, 8 So. 2d at 526. The court determined that electricity fit this definition of "tangible" because electricity is made up of electrons, and electrons have mass or weight. Moreover, electricity can be tasted, smelled, and touched. In fact, a sufficient charge could tear a

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[8] The Supreme Court of Alabama's discussion of this issue is what had been–until today–characterized as judicial *dicta*: the resolution of an issue presented by the parties but not necessary for the disposition. In this instance, however, the majority does not recharacterize it as *obiter dicta* and brush it aside. Rather, it describes it as an express holding of the court, which the majority chooses to join. Slip op. at 14.

hole in a person's body. *Curry*, 243 Ala. at 60, 8 So. 2d at 526. This decision was cited and discussed in the parties' briefs in *Farrand Coal*.

In 1957, this court decided *Farrand Coal*. As noted earlier, the briefs in that case contain page after page of scientific argument on the tangibility of electricity. The plaintiff argued, *inter alia*, that electricity can be touched, as when a person receives an electric shock. Moreover, it was perceptible to other senses in that it could be seen and tasted. Further, energy is tangible because it is measurable, real, objective, and corporeal. *Farrand Coal*, plaintiff's brief at 22. Electricity can also be measured and weighed, and it is carried to the customer though a wire by the use of electrons. *Farrand Coal*, plaintiff's brief at 23. The plaintiff discussed *Curry*, and noted that it held that electricity was tangible because it was made up of electrons and was perceptible to the senses. *Farrand Coal*, plaintiff's brief at 29-30.

In response, the defendants reviewed the scientific testimony and argued that the plaintiff's witnesses were not convincing because they viewed almost everything as tangible and the defendants did not believe that the legislature meant to speak so broadly when it used the term "tangible personal property" in the Retailers' Occupation Tax Act. *Farrand Coal*, defendants' brief at 16. The defendants agreed that "tangible" means "capable of being touched," or "perceptible to the touch," but did not believe that the commonly understood meanings of those terms included energy. *Farrand Coal*, defendants' brief at 11, 16. Moreover, the

defendants argued that, although the *effects* of electricity could be felt, that is not the same thing as saying that electricity can be touched. *Farrand Coal*, defendants' brief at 41. The defendants also acknowledged that they were not arguing that electricity was not tangible in any possible sense, and that it may be accurate to describe it as tangible in the sense that everything that exists is tangible. However, the defendants did not believe that the legislature intended to use such a farfetched meaning of "tangible" in the Act in question. *Farrand Coal*, defendants' brief at 43-44. Moreover, the defendants explained that this court's previous holding that electric utilities were engaged in a service business rather than in retailing tangible personal property were well-taken because the only possible tangible things in electricity would be the electrons, but those are not purchased by the customer. Rather, the electrons flow from the utility, through the customer's appliances, and then back to the utility through a return wire. Thus, the customer is not purchasing electrons, but is purchasing the work that the electrons do. *Farrand Coal*, defendants' brief at 44. The defendants acknowledged that *Curry* had based its decision that electricity is tangible on the basis of electrons, but argued that this was misleading because the electrons are not delivered to the customer by the utility. Rather, the customer pays for and receives the benefit of electric current (a service). *Farrand Coal*, defendants' brief at 45. When a customer plugs in his or her electric coffee pot, the customer gets hot coffee. The customer does not come into possession of whatever caused

the coffee to become hot. *Farrand Coal*, defendants' brief at 49-50. The defendants also explained that Illinois cases holding that electric utilities sell a service really disposed of the whole case because, if the utility is not selling tangible personal property to its customers, then it cannot be *reselling* tangible personal property derived from coal or any other source. *Farrand Coal*, defendants' brief at 49.

This court agreed with the parties that the definition of "tangible" is " '[c]apable of being touched; also, perceptible to the touch; tactile; palpable.' " *Farrand Coal*, 10 Ill. 2d at 511, quoting Webster's New International Dictionary (2d ed. 1946). The court, however, expressly declined to wade into the minutiae of the scientific testimony and declare who was right. Rather, the court stated that "[t]he true criterion on which the decision of this case must turn is not what meaning the respective witnesses may attach to such phrase, but what was the intention and meaning of the General Assembly in using such phrase in the statute in question." *Farrand Coal*, 10 Ill. 2d at 510. The court decreed that energy fell short of "fitting into the ordinary and popularly understood meaning of the word 'tangible' as used by the General Assembly."[9] *Farrand Coal*, 10 Ill. 2d at

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[9] Exelon claims that the court was only speaking about the energy in coal in this portion of the opinion, but the opinion does not state this. Moreover, the defendants in *Farrand Coal*, when arguing that electric energy is intangible, incorporated by reference their arguments about energy in general, noting that "if energy is intangible, electric energy (which is just a

511. Thus, the court seemed to accept the defendants' argument that, although energy may be tangible in the sense that everything that exists is tangible, it did not believe that the legislature intended to speak so broadly. Just as importantly, however, the court grounded its decision in this court's precedents. The court noted that it had already held in *Peoples Gas Light & Coke Co.* that electric utilities are engaged in a service business and are not subject to the Retailers' Occupation Tax. *Farrand Coal*, 10 Ill. 2d at 512. Moreover, although this court had held in *Menagas* that electrical energy was personal property in that it could be the subject of larceny, the court in that case twice referred to electrical energy as intangible. *Farrand Coal*, 10 Ill. 2d at 512. Finally, the court acknowledged that other courts had held electricity to be tangible personal property, but distinguished those cases on the basis that they either involved statutes declaring electricity to be such or were based on holdings that electric utility companies are engaged in manufacturing commodities. This was contrary to this court's holding in *People ex rel. Mercer v. Wyanet Electric Light Co.*, 306 Ill. 377 (1922), which held that electric utilities are neither manufacturing nor mercantile companies. *Farrand Coal*, 10 Ill. 2d at 512.

Several things should be apparent to the reader at this point. First, the highlighted points in Dr.

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form of energy) is necessarily intangible." *Farrand Coal*, defendants' brief at 35-36.

Fajans' affidavit are not at all new, and, in fact, predate *Farrand Coal*. We are *not* departing from *Farrand Coal* because that case was based on our scientific understanding of over half a century ago and our scientific understanding has progressed beyond that time. Slip op. at 14. Rather, we are overthrowing 75 years of consistent, established precedent for no other reason than that Exelon went out and hired an expert to testify to the exact same things that experts have been testifying to since the 1930s. Although the majority claims that our scientific understanding has progressed since 1957, the Supreme Court of Alabama had reached the same point for the same reasons in 1942.

Second, the irrelevance of the majority's citation to three electricity texts with the parenthetical "tracing understanding of electricity from mysterious force to flowing electrons" should now be apparent. This is *not* something that has happened since 1957. It is not the case that the *Farrand Coal* court was in a benighted state of scientific understanding, believing that electricity was a mysterious force, but the present court understands that electricity is a flow of electrons. Rather, the *Farrand Coal* court understood perfectly well that electricity is a flow of electrons. Moreover, as Time magazine reported in 1934, in the trial court proceedings that led to this court's decision in *Peoples Gas Light & Coke Co.*,

> "[n]o one attacked the orthodox teaching of physics that electric current is a flow of matter having mass. A current of one ampere is a flow of 6,281 billion billion electrons per

> second past a given point. An electron is a particle of matter weighing 0.8999 billionths of a billionth of a billionth of a gram." *Electricity in Court*, Time (July 30, 1934).

Similarly irrelevant is the majority's citation to Teach Yourself Electricity and Electronics for the proposition that one must understand general physics principles to grasp electricity and electronics, as the majority never identifies any principles of physics that the *Farrand Coal* court was unable to grasp. Indeed, it is the majority's inability to grasp that *Farrand Coal* was not based on *any* theory of electricity that makes it unable to see that its entire opinion rests on an invalid premise. Third, the reader will note that Dr. Fajans' points about electricity being perceptible to the senses and that a person can receive a shock from electricity are equally as stale and long predate *Farrand Coal*.

The only thing in Dr. Fajans' affidavit that the majority points to that postdates *Farrand Coal* would be his assertion that scientists have recently been able to see the density of electrons with scanning tunneling microscopes.[10] The scanning tunneling microscope was developed in 1981. See http://en.wikipedia.org/wiki/Scanning_tunneling_microscope (last visited December 5, 2008). But surely the majority does not believe that this is any reason to overturn *Farrand Coal*. First, this was

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[10] In its brief, Exelon does not rely on this portion of Dr. Fajans' affidavit.

not an advancement in electrical theory. The scanning tunneling microscope merely allowed scientists to get a better look at what they already knew was there. Second, this court's previous decisions holding that electric utilities render service instead of retailing tangible personal property are *not* based on any disbelief in the electron or the density of electrons. The scanning tunneling microscope might be relevant if this court had stated that until someone could prove that electrons have density, we would classify electricity as intangible, but this court never said or implied any such thing. Finally, let us examine where the majority's scanning tunneling microscope point takes us in terms of legislative intent. Would any member of today's majority be willing to step forward and make the following argument? When the legislature enacted the tax credit in question in 1982, it was aware that this court had held that electric utilities are not retailers of tangible personal property. The legislature, however, wanted this tax credit to be available to electric utilities. The legislature considered simply defining tangible personal property as including electricity, as it had done in section 5 of the Public Utilities Revenue Act. But then someone pointed out that, just the previous year, the scanning tunneling microscope had been invented. Realizing that scientists would use this to see the density of electrons, the legislature concluded that the Illinois Supreme Court would change its mind about the tangibility of electricity, and therefore the legislature could simply use the undefined term "tangible personal property" and wait for this court

to overrule *Farrand Coal*. Unless the majority is willing to make this extravagant argument, I think it will have to concede that the invention of the scanning tunneling microscope in 1981 does not offer any insight into whether the legislature intended this tax credit to be available to electric utilities.

Fourth, when the majority states that *Farrand Coal* was based on our scientific understanding of over half a century ago, the majority fails to contemplate the extent to which *Farrand Coal* declined to weigh in on the battle of scientific experts in that case. Thus, as soon as one begins searching for the answers to the legal questions raised in this appeal in Teach Yourself Electricity and Electronics or Electric Universe: The Shocking True Story of Electricity, that person has missed entirely the point of *Farrand Coal*. The experts gave extensive, detailed arguments in *Farrand Coal*, and the parties expounded on these points at great length in their briefs. But, as the Department pointed out, this court expressly *declined* to declare if any particular expert was right and simply said that "[t]he true criterion on which the decision of this case must turn is not what meaning the respective witnesses may attach to such phrase, but what was the intention and meaning of the General Assembly in using such phrase in the statute in question." *Farrand Coal*, 10 Ill. 2d at 510. One thing that should be abundantly clear to anyone who has read both the briefs and the decision in *Farrand Coal* is that, had Dr. Fajans' affidavit been part of the record in that case, it

would not have made the slightest bit of difference to this court's decision. In *Farrand Coal*, this court did not *believe* that the legislature intended to speak so broadly as to include electricity within the definition of tangible personal property. But now that *Farrand Coal* explained that electricity is not tangible personal property, *we know for sure* that the legislature does not intend to include electricity when it uses the term "tangible personal property."

At oral argument, one of the justices asked the Department's attorney if the question before this court is a scientific one. The simple answer to that question is "no." If *Farrand Coal* would have settled the battle of experts and based its conclusion on who had the science of the issue correct, and if there was no evidence that the legislature had relied on that conclusion, and if the science had in fact changed since that time, then perhaps the question before this court would be a scientific one. But none of those things are true. Perhaps because the *Farrand Coal* court realized that this body is ill equipped to resolve disputes among physicists, it relied simply on what it believed the legislature intended when it used the term "tangible personal property." The question before this court is *not* a scientific one, but a legal one that this court is well equipped to answer: Should we presume that when the legislature enacted the tax credit in question it acted with knowledge of this court's long-standing determinations that electric utilities are not retailers of tangible personal property? That is the question before the court, and the majority never answers it.

Instead, the majority makes a scientific determination after having heard only one side of the argument. Dr. Fajans stated that electricity is tangible as a matter of irrefutable scientific fact, but our cases show that scientists–even Nobel prize winners–dispute this fact every time the question is litigated. In this case, the Department asked for time to get its own expert if the question were determined to be a factual one, but the Department prevailed on its claim that this question has been decided by this court as a matter of law, and the Department can hardly be faulted for grounding its position in this court's precedents. If distinguished scientists cannot agree on this question, should the justices of this court not be leery of believing that they can solve the question by reading Teach Yourself Electricity and Electronics? Moreover, if the majority now wants to make this a factual issue, it oversimplifies the question when it determines that all we need to know is that electrons are matter–a fact that was not contested even in 1934. Also relevant is whether electrons are what is sold by the utility to the customer. In other words, are electric utilities retailers of electrons or of the work that electrons do? The argument was made in *Farrand Coal* that because the electrons flow from the utility to the customer and then back to the utility, the customer never purchases electrons from the utility. Rather, the customer is simply purchasing the work that electrons do–something that is unquestionably intangible. This conclusion is supported by the testimony of the expert witness in *Menagas*, who explained that "[w]hen the electrons are going out through the

conductor they are charged with potential energy, but when forced through the resistance, such as an electric light bulb or a motor, the potential energy is taken out, and the electrons return to the generator possessing only kinetic energy." *Menagas*, 367 Ill. at 332. If there is anything in Dr. Fajans' affidavit that would call these conclusions into question and suggest that the customer actually purchases electrons from the utility, the majority has not cited it.

Fifth, the majority also fails to comprehend the extent to which *Farrand Coal* was grounded in this court's precedents, particularly *Peoples Gas Light & Coke Co.*, which held that electric utilities are in the business of rendering a service and are not retailers of tangible personal property. The only significance the majority sees in *Peoples Gas Light & Coke Co.* is that the court deemed it unnecessary to determine whether electricity was tangible personal property. Slip op. at 11. But the *reason* the court found it unnecessary to decide that question was that the court concluded that electric utilities were not retailers of *any* property, tangible or otherwise. Rather, they were engaged in a service business. See *Peoples Gas Light & Coke Co.*, 359 Ill. 2d at 154-61. The upshot is that we now have pronouncements from the Illinois Supreme Court that, for purposes of Illinois tax statutes using virtually identical definitions, electric utilities both *are* (*Exelon*) and *are not*

(*Peoples Gas Light & Coke Co.*) retailers of tangible personal property.[11]

Finally, as to the majority's statement that the discussion of the tangibility of electricity was "skewed by the true issue presented in that case" (slip op. at 14), there was no one "true issue" in *Farrand Coal*. There were several distinct issues because the plaintiff's claim required it to prove several different things. The court discussed all of the issues, and its discussion of the tangibility of

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[11] On a side point, the majority refers to Dr. Fajans' affidavit and report as being "unrebutted." Slip op. at 11. It is not clear whether, by using this term, the majority is giving credence to Exelon's claim that it is entitled to judgment in its favor because this affidavit was unrebutted. It should be pointed out that the Department argued that whether Exelon was involved in retailing was a question of law under the statute, and the Department requested time to obtain its own expert witness in the event that this was determined to be a question of fact. The ALJ agreed with the Department that, as a matter of law, Exelon was not engaged in retailing. It would have been apparent to anyone who understood this court's decisions in *Peoples Gas Light & Coke Co.* and *Farrand Coal* that there was no point in getting another expert affidavit on the tangibility of electricity. Since the Department prevailed on its point that this was a question of law, and since the Department could not possibly have anticipated either the indifference this court would show to its own precedent or that this court would treat 100-year-old science as new, there is little relevance in Dr. Fajans' affidavit being unrebutted. Moreover, as to Exelon's point that the unrebutted affidavit requires this court to find that electricity is tangible, that would necessarily mean that if in the next tax case a party presents an unrebutted affidavit that electricity is intangible, this court would be forced to change its mind again.

electricity was not "skewed" by anything. Quite the contrary, as thoroughly demonstrated above, it was solidly grounded in this court's precedents. This court had already held that electric utilities were in the business of rendering service, not retailing tangible personal property, and this court and the appellate court have consistently followed that precedent. In fact, the only "skewed" decision on this issue in the past 75 years is the present one, in which a majority of this court allowed its judgment to be skewed by an affidavit that merely rehashed points that have been made since the 1930s.

The majority trumpets as a benefit of its holding that Illinois will now be brought into line with California, Rhode Island, Alabama, and Florida, which have all held electricity to be tangible personal property in different contexts. Slip op. at 14. But the majority never explains the relevance of this or what possible benefit will ensue. This is no more relevant or consequential than the fact that we have now created a conflict with Nebraska and New York, which have held electricity not to be tangible personal property. See *XO New York, Inc. v. Commissioner of Taxation & Finance*, 856 N.Y.S.2d 310, 51 A.D.3d 1154 (2008); *Omaha Public Power District v. Nebraska Department of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). The important question is *not* what other states have held, but what our legislature intended when it used the phrase "tangible personal property" in this particular tax statute. Given this court's previous decisions, there can be no question.

IV. CONCLUSION

I agree with my colleagues that the appellate court's decision should be affirmed, but I would do so for the reason that the appellate court's decision was correct as a matter of law. This court has consistently held that electric utilities are engaged in rendering service, not in retailing tangible personal property. The legislature has understood for decades that, for purposes of Illinois tax law, the term "tangible personal property" does not include electricity, and has acted accordingly. It is now the proper role of the judiciary to stay out. The majority has demonstrated a surprising indifference to this court's established precedent, first violating *Cates* by casting aside this court's discussion of an issue central to a plaintiff's claim and fully briefed by the parties as *obiter dicta*, and then overturning 75 years of consistent, established precedent on the basis of ancient science that predates that precedent. One senses in the majority opinion a sincere desire to demonstrate that the Illinois Supreme Court is on the cutting edge of the latest science. Unfortunately, the relevant science has not changed in the past 75 years, and there is no evidence that the legislature's intent has either.

Dissent Upon Denial of Rehearing

JUSTICE THOMAS, dissenting:

Although I commend the majority's decision to make its opinion prospective only, that remedy falls far short of what is truly necessary in this case: allowing rehearing and addressing the

Department's arguments. The grounds for allowing rehearing are points overlooked or misapprehended (see 210 Ill. 2d R. 367), and this opinion contains both.

The majority barely mentions the Department's arguments, and has essentially overlooked the Department's entire brief. Not only that, the majority completely misrepresents the Department's position. See slip op. at 14 ("The parties agree that if electricity is 'tangible personal property,' then Exelon would be engaged in 'retailing' as defined by section 201(e)"). The principal argument that the Department made on appeal–that given this court's precedents going back 75 years that electric utilities are not retailers of tangible personal property (see *Peoples Gas Light & Coke Co.*, 359 Ill. at 158-61), we must assume that the legislature did not intend for the tax credit in question to apply to electric utilities–is never addressed. This failure of the majority to do so is rendered even more puzzling by the reasons the majority gives for making its opinion prospective only. The majority concedes that the outcome of today's opinion was not clearly foreshadowed. Slip op. at 15. Indeed, it was the opposite result that was clearly foreshadowed. The majority further states that *Farrand Coal* "suggested" in "*obiter dicta*" that electricity is intangible.[12] Slip op. at 15. The majority also explains that prospective application will give the

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[12] This is wrong twice. First, it was not a suggestion. Second, it was not *dicta*, let alone *obiter dicta*.

legislature a chance to comport with this court's new definition, while avoiding the uncertainty in other areas of tax law that would result from retroactive application. Slip op. at 16. Is this not a clear acknowledgment that the legislature did *not* intend for the tax credit to include electric utilities when it originally enacted it? And, if the majority concedes that "the fundamental rule of statutory construction is to give effect to the intention of the legislature" (slip op. at 6), why not simply hold that the tax credit is not available to electric utilities? I would allow rehearing, address the Department's arguments, apply this court's well-established precedent, and hold that the tax credit is not available to electric utilities. Below is a summary of the key problems with the majority opinion that demand some sort of corrective action.

I. *Obiter Dicta*: The Majority Opinion Is Wrong on the Merits

The Department correctly points out that this court's determination that *Farrand Coal*'s discussion of the tangibility of electricity was *obiter dicta* is demonstrably false. As the Department notes, an essential element of the plaintiff's claim in *Farrand Coal* was demonstrating that its product was resold by the purchaser as tangible personal property. Accordingly, the plaintiff could not succeed without demonstrating that electric utilities sell tangible personal property. Thus, the discussion of this issue could not be *obiter dicta*. Moreover, in the section of the opinion that the majority *acknowledges is the court's holding*, this

court stated quite clearly and explicitly that the sale of electrical energy by a utility is *not* a sale of tangible personal property. *Farrand Coal*, 10 Ill. 2d at 513. How much more clearly could the court have said it? Moreover, if the court *expressly held* that energy is intangible (*Farrand Coal*, 10 Ill. 2d at 511), how can the majority possibly conclude that it is an issue of first impression whether *electrical energy* is intangible? Exelon's counsel conceded in its written argument in support of summary judgment that the holding that energy is intangible necessarily includes electricity:

> "The court in *Farrand Coal Co.* found that *electricity* was not 'tangible' in the ordinary sense of the word because, apart from its connection with mass and matter, 'energy' cannot be stored, weighed, transported, or touched, and it thus not otherwise perceptible by the senses." (Emphasis added.)

Does the majority really expect anyone to believe that when this court stated that energy is intangible and that electric utilities are not retailers of tangible personal property it was merely making offhand comments (for who knows what reason) instead of addressing and rejecting the key component of the plaintiff's claim? Moreover, the majority does not believe its own opinion. The majority states that *Farrand Coal* was based on our scientific understanding of over a half century ago, but that our current understanding of

electricity has progressed beyond that time.[13] If this is an issue of first impression (slip op. at 14), what has our understanding of electricity progressed beyond?

The Department makes a couple of additional points that should be noted. First, the Department points out that the relevant precedent from this court has already been described as a holding. In *Waukegan School District*, this court explained that "[t]his court *held* in *Peoples Gas Light & Coke Co. v. Ames* (1934), 359 Ill. 152, that the retailers' occupation tax did not apply to public utilities because *those corporations are not in the business of selling tangible personal property*, but are in the business of providing a public utility service. (See also *Farrand Coal v. Halpin* (1957), 10 Ill. 2d 507 ***.)" (Emphases added.) *Waukegan School District*, 95 Ill. 2d at 252-53.[14] Second, the

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[13] It should be noted that *Farrand Coal* was decided five years after the United States had detonated a hydrogen bomb. The majority gives no support at all for its claim that the properties of electricity were a mystery in 1957.

[14] As the Department notes, the continued validity of *Waukegan School District* is now also in doubt. In that case, this court held that a tax that applied to "persons engaged in the business of distributing supplying, furnishing, or selling electricity for use or consumption" was an impermissible tax on the sale of services." *Waukegan School District*, 95 Ill. 2d at 252-54. The taxing authority tried to argue that it was taxing the "product" sold by the utility, but this court, relying on *Farrand Coal* and *Peoples Gas Light & Coke Co.*, rejected that argument on the basis that utilities render a service and are not retailers of tangible personal property. This court explained that the term "service" under Illinois tax law means

appellate court read *Farrand Coal* the same way. In *Union Coal Co.*, the appellate court stated that "[i]n the *Farrand* case the court *held* an electric utility company does not sell tangible personal property when it sells electricity or electrical energy." (Emphasis added.) *Union Coal Co.*, 38 Ill. App. 3d at 294. Third, the Department points out that the meaning of *Farrand Coal* was so well established that *even Exelon's counsel* several times at the administrative and circuit court levels described *Farrand Coal* as holding that electricity is not tangible personal property. The record is replete with such examples. It was only after Exelon's repeated attempts to distinguish *Farrand Coal* failed that Exelon changed its position on appeal and made a *dicta* argument–an argument that should have been summarily rejected.

When this court can characterize as *obiter dicta* a discussion that has been uniformly recognized as a holding and that addresses a key component of one of the parties' claims, it shows that this court will characterize *anything* as *obiter dicta*, thus avoiding *stare decisis* considerations. This court cannot expect the bench and bar to afford our

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"all 'sales' transactions *other than sales of tangible personal property*." (Emphasis added.) *Waukegan School District*, 95 Ill. 2d at 254. Therefore, Commonwealth Edison's sale of electricity to its customers was provided as part of a service and was not a sale of tangible personal property. *Waukegan School District*, 95 Ill. 2d at 253-54. If electric utilities are now retailers of tangible personal property (slip op. at 14), then *Waukegan School District* is now of the same dubious validity as *Peoples Gas Light & Coke Co.* and *Farrand Coal*.

opinions a level of deference and respect that we are unwilling to give ourselves.

Much more importantly, however, let us assume for a moment that the majority is correct and that all relevant portions of *Farrand Coal* were mere *obiter dicta*. This in no way justifies the majority's refusal to consider the legislature's intent in using the phrase "tangible personal property" in the statute in question. An unstated fallacy in the majority opinion is that the rules of *dicta* apply to the legislature. If we are willing to concede that they do not, then it is obvious that we must consider whether the legislature would have relied on *Farrand Coal* and the decisions interpreting it. As I have already demonstrated above, until the majority's opinion in this case, there appeared to be universal agreement about what *Farrand Coal* said. Given that, it is safe to assume that the legislature acted with the same belief. Further, there was appellate court authority describing this portion of *Farrand Coal* as a holding. See *Union Coal Co.*, 38 Ill. App. 3d at 294.

Taking things a step further, what if the *Farrand Coal* opinion did not even exist? The majority's opinion would still be directly contrary to *Peoples Gas Light & Coke Co.* This court established in that case that utilities are *not* retailers of tangible personal property, but are engaged in a service business. *Peoples Gas Light & Coke Co.*, 359 Ill. at 154-58. That case involved whether gas and electric utilities could be taxed under the Retailers' Occupation Tax Act, which was a tax upon retailers of tangible personal property.

As in this case, the parties introduced scientific evidence concerning whether what they sold was tangible. This court concluded that it did not have to reach that issue, because the legislature treats utilities and retailers differently and that a tax imposed on retailers could not be imposed on utilities. The court held that, for tax purposes, utilities are engaged in a service business and are not retailers. Commonwealth Edison was involved in that case, too, and it and the other utilities convinced this court to adopt this position. We agreed with Commonwealth Edison and the other utilities that "*their occupation constitutes a peculiar class of business enterprise entirely distinct and separate from the business of the retailer or retail merchant.*" (Emphasis added.) *Peoples Gas Light & Coke Co.*, 359 Ill. at 155. This court held that the language of the public utilities act clearly showed that the legislature regards utilities as engaged in service. *Peoples Gas Light & Coke Co.*, 359 Ill. at 155. We further explained that the legislature could not have intended the Retailers' Occupation Tax Act to apply to utilities because "the act plainly refers to those engaged in the business of selling tangible personal property for use or consumption." *Peoples Gas Light & Coke Co.*, 359 Ill. at 158. This point bears repeating: *this court specifically held that the legislature could not have intended a statute to apply to public utilities if it referred to "those engaged in the business of selling tangible personal property."* In this case, we are faced with a tax credit that the legislature reserved for those engaged in the business of selling tangible personal property. Even if *Farrand*

Coal had never existed, Exelon's arguments should be rejected, and they should be rejected because of the very law that Exelon's predecessor helped to bring about.

Even if this court now wants to say that all relevant parts of *Farrand Coal* were *obiter dicta*, that does not mean that we do not have to consider whether the legislature would have acted in reliance on that opinion, or on any of the opinions interpreting it, or on any of the opinions that preceded it. Similarly, does the majority really believe that the legislature would have concerned itself with whether *Menagas*'s statement that electricity is intangible was merely an "assumption" and that assumptions do not constitute holdings (slip op. at 11)? The majority seems to be coming around to these points. It already acknowledged in the opinion that "it was reasonable for the appellate court to consider itself bound by this court's discussion of the tangibility of electricity in *Farrand Coal*." Slip op. at 12. Moreover, in the new section of the opinion making this decision prospective only, the court explains that its holding was not clearly foreseen and that it wants to give the legislature a chance to comply with its holding. Slip op. at 15. Thus, the majority has clearly acknowledged the strong possibility (if not certainty) that the legislature relied on this court's and the appellate court's previous opinions. No justification exists for the majority's refusal to address the Department's arguments.

II. A Legal Question Becomes a Factual Question: The Majority's Remedy Is Wrong

Another reason that rehearing (or at least a more extensive modification to the majority opinion) is necessary is to clarify this court's holding to ward off the inevitable confusion that will follow. The majority begins its analysis by stating that "this case presents solely questions of law." Slip op. at 5. If the majority had addressed the true question in this case–whether we presume that when the legislature enacted the tax credit in question it acted with knowledge of this court's long-standing determinations that electric utilities are not retailers of tangible personal property–then the question would be a legal one. But the majority never addresses that issue, choosing instead to answer a *factual* question: whether, as a matter of scientific fact, electricity is tangible.[15] The court

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[15] The greatest misunderstanding in the majority opinion, which taints everything, is its belief that the question before the court is scientific. This was simply a nonissue introduced into the case by Exelon that this court unfortunately made the centerpiece of its opinion. The Department put it best in its reply to Exelon's response to its summary judgment motion when it wrote:

> "The fact that Taxpayer's expert, Professor Fajans, believes that electricity is tangible as a matter of science, however, is of no legal consequence. The issue of whether electricity is tangible for purposes of this tax credit, is not a question of science or even fact, but what the General Assembly intended to include under the phrase 'tangible personal property.' From the *Farrand* decision we know that within the framework of its ordinary and popular meaning, 'tangible

then relies on the fact that the record contains the unrebutted affidavit of Dr. Fajans that electricity is tangible. Slip op. at 12. Clearly, the majority is resolving a factual question, not a legal one.

The Department argues in its petition for rehearing that if this court now wants to make this a factual question instead of a legal one, then it should remand for further proceedings. The basis for the Department's summary judgment motion was that whether an electric utility is a "retailer" under the statute is a question of law and that the physical properties of electricity were not material to that issue. The Department explained that whether Dr. Fajans believed that electricity was tangible as a matter of science was irrelevant, because the issue had already been decided as a matter of law. Exelon argued that whether electricity was tangible was an essential *factual* question that needed to be resolved, and at one point *even conceded that its summary judgment motion should be denied because whether electricity or electrons are tangible personal property was a material fact question that precluded summary judgment.* As I noted in my special concurrence, the Department grounded its

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personal property' does not include electricity. Accordingly, *a scientist can shed no light, or be of any assistance, to this Tribunal in understanding whether the legislature meant to include electricity within 'tangible personal property.'* This question can only be addressed by a court as a question of law through means of statutory interpretation, which the Illinois Supreme Court has already done." (Emphasis added.)

summary judgment motion in this court's precedents resolving the question as a matter of law, but asked for time to obtain its own expert in the event that the relevant questions were determined to be factual. The Department prevailed on its argument that this was a question of law at the administrative level, the circuit court level, and the appellate court level. Thus, there was never a reason for the Department to submit testimony on this issue. If this court agrees with Exelon that the issue that must be resolved is one of scientific fact, then it should also agree with the position that Exelon took below: that the existence of this material fact question precludes summary judgment in Exelon's favor.

This court completely misrepresented the Department's position in its original opinion when it stated that "[t]he parties agree that if electricity is 'tangible personal property,' then Exelon would be engaged in 'retailing' as defined by section 201(e)." Slip op. at 14. This was never the Department's argument, and this point alone mandates that we grant rehearing.[16] The

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[16] Even if the Department had made this argument, the majority would be required to reject it under *Peoples Gas Light & Coke Co.* If the scientific evidence in *that case* was held to be irrelevant to the question of whether an electric utility is a retailer, then it should also be found to be irrelevant in *this case*. We are not bound by a party's incorrect framing of the issue. (Of course, the Department did not incorrectly frame the issue, the majority did. For a summary of what the Department actually argued, quoted directly from the Department's brief, see my special

Department's position was that whether an electric utility is a "retailer" under the statute is a question of law and that the physical properties of electricity were not material to that issue. The Department correctly argues that now that this court has changed a legal question into a factual one, the cause should be remanded so that the Department may contest the material facts. All relevant facts and scientific opinions should be considered. Instead, the majority simply shuts down the fact-finding process after hearing only one side of one part of the argument. This is profoundly unfair to the Department.

The Department correctly argues that, if this is a factual question, then several important issues need to be resolved. First, relying on my previous dissent, the Department argues that, even if electrons are material, that does not make an electric utility a retailer of tangible personal property. As I explained before, expert testimony considered in our previous cases shows that electrons flow from the utility to the customer and then back to the utility, so that the customer never takes possession of electrons. The customer is simply purchasing the work that electrons do–an unquestioned intangible. I stated previously that, "[i]f there is anything in Dr. Fajans' affidavit that would call these conclusions into question and suggest that the customer actually purchases electrons from the utility, the majority has not cited

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concurrence to the majority opinion (slip op. at 30-31 (Thomas, J., specially concurring)).)

it." Slip op. at 43 (Thomas, J., specially concurring). Not only does Dr. Fajans' report not contradict this point, it fully supports it. In Dr. Fajans' report, he explains that electrons flow from the power source to the load along one wire, and then back from the load to the power source. The report even includes a diagram showing the electrons flowing from the power source to the load and then back to the power source. In other words, and this point cannot be overstated, *even within the four corners of Dr. Fajans' report, a legitimate question exists whether an electric utility can be considered a retailer of tangible personal property.*

Indeed, the State Board of Equalization of California (the Board) relied on this aspect of Dr. Fajans' report to conclude that the sale of electricity was the sale of a service rather than a sale of tangible personal property. In *In re Appeal of PacifiCorp*, 2002 WL 31153476 (September 12, 2002), the Board considered whether the sale of electricity was the sale of tangible personal property. The respondent in that case relied on Dr. Fajans' report to argue that electricity is tangible personal property. The Board concluded that Dr. Fajans' report instead led to the conclusion that the sale of electricity is the sale of a service. The Board noted that the Ohio Supreme Court held in *Otte v. Dayton Power & Light Co.*, 37 Ohio St. 3d 33, 36, 523 N.E.2d 835, 838 (1988), that electricity is a service rather than a product:

> "A 'product' is anything made by human industry or art. Electricity appears to fall outside this definition. This is so because

> electricity is the flow of electrically charged particles along a conductor. DP&L does not manufacture electrically charged particles, but rather, sets in motion the necessary elements that allow the flow of electricity."

The Board found Dr. Fajans' report to be consistent with *Otte*:

> "Although Professor Fajans's discussion of electricity in his report seems intended to support respondent's position that electricity is 'tangible personal property' by emphasizing the 'physical and material' nature of electrons, his discussion is also consistent with the definition of electricity in *Otte* as a 'flow of electrically charged particles along a conductor.' In addition, Professor Fajans's discussion of electricity is also consistent with the conclusion of the court in *Otte* that the 'distribution system' with respect to electricity there was a service. In our view, just as the 'distribution system' by which the flow of electrically charged particles occurred in *Otte* was a service, appellant's generation and transmission of electricity were also services under section 25136."

The Board summed up by concluding that, "for purposes of California tax law, electricity is intangible."[17]

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[17] This is an unpublished decision that is designated "not to be cited as precedent." I discuss it here only to show that

Thus, Dr. Fajans' affidavit and report are no justification for shutting down the fact-finding process. Important questions need to be resolved, and concluding that an electron is material is simply the beginning, not the end, of the inquiry. As *In re Appeal of PacifiCorp* shows, one possible conclusion that can be taken from Dr. Fajans' report is not the majority's view that this court was hopelessly out of touch with science in 1957 when it decided *Farrand Coal*, but rather that this court was ahead of the game in 1935 when it held in *Peoples Gas Light & Coke Co.* that the sale of electricity is the sale of a service rather than the sale of tangible personal property.

Other factual questions that the Department argues need to be resolved now that this court has changed the inquiry to one of fact are: (1) whether, when the Investment Tax Credit was enacted in 1981, "humanity" (slip op. at 12) (and, by necessary extension, the General Assembly) considered electricity to be tangible personal property; and (2) whether, even if the transmission of electricity is the sale of tangible personal property, Exelon was "primarily engaged in *** retailing" within the meaning of the Investment Tax Credit, or was instead primarily engaged in the production,

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more than one legitimate conclusion can be drawn from Dr. Fajans' report. Further, in the California case cited by the majority, *Searles Valley Minerals Operations, Inc. v. State Board of Equalization*, 160 Cal. App. 4th 514, 72 Cal. Rptr. 3d 857 (2008), the California appellate court itself cited and discussed *In re Appeal of PacifiCorp* and distinguished it instead of dismissing it as nonprecedential.

purchase, transmission, and distribution of electricity.[18] Both points are well-taken, and these questions need to be resolved. Clearly the Department is correct that a remand is the appropriate course of action following the majority's decision to transform the relevant inquiry into one of fact.

III. Failure to Completely Dispose of the Appeal

Now that the court has made its opinion purely prospective–applying only to tax year 2009 and after–and has affirmed the judgment of the appellate court, its previous reasons for not addressing Exelon's uniformity clause argument are no longer valid. Exelon sought the tax credit for tax years 1995 and 1996 under two theories: (1) it is entitled to it as a matter of statutory construction; and (2) the Department's failure to grant it the tax credit violated the uniformity clause of the Illinois Constitution. Explaining why it is not reaching the second issue, the court states that, "[a]s the Department correctly observed in its motion for summary judgment and at oral argument before this court, if Exelon qualifies for the section 201(e) tax credit as a matter of

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[18] The majority's implied conclusion that this question does not need to be answered is curious, given the majority's citation to L. Hyman, A. Hyman & R. Hyman, America's Electric Utilities: Past, Present and Future 89 (7th ed. 2000), for the proposition that electric utilities must "perform the following functions to deliver the product: production, marketing, transmission, distribution, metering and billing, and retail supply." Slip op. at 12.

statutory construction, then there is no reason to reach the alternative constitutional issue." Slip op. at 5-6. The court later explains that constitutional issues are only reached when the matter may be resolved on nonconstitutional grounds, and states that the court's "disposition of this cause obviates the need to determine whether the Department violated the uniformity clause of the Illinois Constitution." Slip op. at 16. It goes without saying that the court's decision to change its judgment from a reversal to an affirmance mandates that we now address Exelon's other issue. This appeal involves Exelon's claim for tax years 1995 and 1996, over a decade before the effective date of the majority's holding that electric utilities are retailers of tangible personal property. Thus, the majority affirms the appellate court's judgment denying Exelon the credit. How can this court possibly *deny* Exelon the credit on the first issue and then refuse to address Exelon's second argument on the basis that Exelon's *qualification* for the credit on the first issue obviates the need to address Exelon's second argument? Given the court's revisions on denial of rehearing, Exelon is entitled to be heard on its uniformity clause argument.

IV. Conclusion

In sum, rehearing should be granted, and this court should at long last address the Department's arguments. There was an obvious outcome in this case, and this court should apply its long-standing precedent that electric utilities are engaged in a

service business and are not retailers of tangible personal property. No legitimate reason exists to fundamentally alter the tax treatment of electric utilities after all this time. This court's precedents are now that electric utilities are not engaged in retailing (*Peoples Gas Light & Coke Co.*) and are primarily engaged in retailing (*Exelon*). The majority's failure to explain how this can be so ensures no end of headaches not only for the Department and the legislature, but also this court, which will likely spend years considering questions thought put to rest decades ago. If the majority is unwilling to acknowledge and address the Department's arguments, it should remand for further fact-finding. It is also mandatory that the court now address Exelon's uniformity clause argument.

For all of the above reasons, I cannot join the majority's decision to deny rehearing.

Appendix B

Docket No. 105582.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

EXELON CORPORATION, Appellant, v. THE DEPARTMENT OF REVENUE *et al.*, Appellees.

Opinion filed February 20, 2009.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

Justice Thomas dissented, with opinion.

Justice Burke took no part in the decision.

OPINION

Plaintiff, Exelon Corporation, as successor to Unicom Corporation, filed a complaint in the circuit court of Cook County seeking administrative review of a decision by the Department of Revenue (Department). The Department denied plaintiffs claim for replacement tax investment credits provided by section 201(e) of the Illinois Income Tax Act (35 ILCS 5/201(e) (West 1994)). The circuit court confirmed the Department's decision, and the appellate court affirmed. 376 Ill. App. 3d 918. We allowed plaintiff's petition for leave to appeal (210 Ill. 2d R. 315(a)). For the following reasons, we reverse the judgments of the appellate and circuit courts, set aside the Department's decision, and remand the cause to the Department with directions to grant the section 201(e) tax credit to Exelon.

I. BACKGROUND

The facts are undisputed. Commonwealth Edison (ComEd) was a wholly owned subsidiary of Unicom Corporation. During the years 1995 and 1996, ComEd was a public utility company principally engaged in the production, purchase, transmission, distribution and sale of electricity. During those years, ComEd bought nearly $3 billion in property that it used for generating, transmitting, and distributing electricity to its customers.

Unicom filed a combined 1995 and 1996 Illinois tax return. Unicom was liable for the "personal property tax replacement income tax" imposed by

section 201(c) of the Illinois Income Tax Act. See 35 ILCS 5/201(c) (West 1994). Unicom timely filed amended returns, in which it claimed investment credits against this tax liability provided by section 201(e) of the Income Tax Act. Section 201(e) provides a tax credit for investments in property used in Illinois by, among others, retailers. The section defines "retailing" as "the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities." See 35 ILCS 5/201(e) (West 1994). Unicom claimed a section 201(e) credit of $10,419,507 for 1995, and claimed a section 201(e) credit of $4,398,115 for 1996. The Department denied both claims.

Unicom filed an administrative protest and requested a hearing. The Department and Unicom filed cross–motions for summary judgment. The sole disputed point of law was whether Unicom was engaged in "'retailing" as defined by section 201(e). The Department contended that Unicom was not engaged in retailing because it did not sell "tangible personal property," but rather sold electricity, which was intangible. Unicom contended that electricity was "tangible personal property" as required by the statute. Unicom attached to its motion an affidavit and report from its expert witness, Dr. Joel Fajans, a professor of physics at the University of California, Berkeley. Dr. Fajans opined that "as a matter of irrefutable scientific fact, electricity is physical and material" because it can be measured and stored, obeys physical laws, and "can be felt, tasted and seen."

Unicom further contended that the Department's denial of the section 201(e) credit violated the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). Unicom claimed that it was the Department's policy to grant such tax credits to natural gas utility companies but not to electric utility companies. Unicom argued that there was no possible justification for discriminating between natural gas and electric utilities based on the purposes and object of section 201(e).

The Administrative Law Judge (ALJ) recommended granting summary judgment in favor of the Department. The ALJ's written recommendation accepted the Department's arguments, which did not include any rebuttal of Dr. Fajans' expert opinion. Relying on this court's decision in *Farrand Coal Co. v. Halpin*, 10 Ill. 2d 507 (1957), the ALJ concluded that the General Assembly did not intend to include electricity within the meaning of "tangible personal property" when enacting section 201(e). Also, the ALJ accepted the Department's argument pertaining to the uniformity clause. The ALJ concluded: "[T]here is a real and substantial difference in the classes of persons to whom the credit is available, and that this difference is related to Illinois' longstanding [*sic*] public policy of treating differently, for tax purposes, persons who sell tangible personal property versus persons who do not." The Director of Revenue accepted the ALJ's recommendation.

Unicom filed a complaint for administrative review of the Department's decision. Exelon

thereafter succeeded Unicom. The circuit court substituted Exelon for Unicom in the case caption, and confirmed the Department's decision.

The appellate court upheld the circuit court's confirmation of the Department's decision. 376 Ill. App. 3d 918. The appellate court viewed this court's *Farrand Coal* decision as dispositive of the case and concluded that it was "bound by the principle of *stare decisis* and must adhere to the decisions of our supreme court." 376 Ill. App. 3d at 922. The appellate court held that, as a matter of law, Exelon did not engage in the sale of "tangible personal property" as required by section 201(e) of the Income Tax Act. 376 Ill. App. 3d at 921-23. Also, the appellate court rejected Exelon's uniformity clause challenge. 376 Ill. App. 3d at 923-27. Exelon appeals to this court.

II. ANALYSIS

A. Standard of Review

The Income Tax Act provides that judicial review of the Department's decisions be in accordance with the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 1994)). 35 ILCS 5/1201 (West 1994). In a case arising under the Administrative Review Law, we review the decision of the administrative agency, not the determination of the circuit court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007); *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006).

The Administrative Review Law provides that judicial review extends to all questions of law and

fact presented by the entire record. 735 ILCS 5/3–110 (West 1994). The proper standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008); *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 142 (2006). The Review Law limits judicial review to the administrative record; the court may not hear new or additional evidence. The statute additionally mandates that the "findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3–110 (West 1994). Accordingly, when a court reviews an administrative agency's factual findings, it will not reweigh the evidence or substitute its judgment for that of the agency. Rather, the court will only ascertain whether such findings of fact are against the manifest weight of the evidence. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005); *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 471–72 (2005). In contrast, an agency's conclusion on a question of law is reviewed *de novo*. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577; *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998).

A mixed question of fact and law asks the legal effect of a given set of facts. *Cinkus*, 228 Ill. 2d at

211; *Comprehensive Community Solutions*, 216 Ill. 2d at 472. Mixed questions of fact and law are "'questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577, quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 72 L. Ed. 2d 66, 80 n.19, 102 S. Ct. 1781, 1790 n.19 (1982). An agency's conclusion on a mixed question of fact and law is reviewed for clear error. An administrative decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *American Federation of State, County & Municipal Employees*, 216 Ill. 2d at 577-78.

Unlike *Pullman-Standard*, where the rule of law was undisputed, this case presents solely questions of law. The Department and the appellate court each considered itself bound by this court's tangential discussion of the physical properties of electricity in *Farrand Coal Co. v. Halpin*, 10 Ill. 2d 507 (1957). In determining whether and to what extent *Farrand Coal* controls the outcome of the present case, this court has the power and the duty to reexamine the authorities and legal concepts invoked in that opinion. See *Bradley v. Fox*, 7 Ill. 2d 106, 111 (1955). As will be explained, every aspect of our analysis involves construing section 201(e) of the Income Tax Act. This a pure question

of law and our review is *de novo*. See, *e.g., Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 214 (1994).

B. The Merits

Before this court, Exelon contends that it qualifies for the section 201(e) tax credit because it falls within the terms of the statute. Exelon alternatively contends that denial of the section 201(e) tax credit violates the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). It is quite established that this court will not address constitutional issues that are unnecessary for the disposition of the case. See, *e.g., In re E.H.*, 224 Ill. 2d 172, 178 (2006) (collecting cases). As the Department correctly observed in its motion for summary judgment and at oral argument before this court, if Exelon qualifies for the section 201(e) tax credit as a matter of statutory construction, then there is no reason to reach the alternative constitutional issue. See, *e.g., Mattis v. State Universities Retirement System*, 212 Ill. 2d 58, 74-75 (2004); *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 396 (1994).

1. "*Tangible* Personal Property"

To determine whether Exelon qualifies for the section 201(e) tax credit, we engage in a two–tier analysis. First, we analyze section 201(e) itself to determine the boundaries of the statute. Second, we determine whether section 201(e) applies in this particular case. See *Van's Material Co. v. Department of Revenue*, 131 Ill. 2d 196, 201–02

(1989); *Zenith Electronics Corp. v. Department of Revenue*, 293 Ill. App. 3d 651, 654 (1997).

The fundamental rule of statutory construction is to give effect to the intention of the legislature. A court's analysis begins with the language of the statute, which is the best indication of legislative intent. Where the statutory language is clear and unambiguous, the court must give it effect without resort to other tools of interpretation. In construing a statute, it is never proper for a court to depart from plain language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 556 (1999); *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181, 184–85 (1999). Absent statutory definitions indicating a different legislative intent, words in a statute are to be given their ordinary and popularly understood meaning. To ascertain the ordinary and popular meaning of words, this court sometimes uses the dictionary as a resource. *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill. 2d 1, 15 (1991); see *Gem Electronics of Monmouth, Inc. v. Department of Revenue*, 183 Ill. 2d 470, 477-78 (1998). Construing a statute is a pure question of law and our review is *de novo*. *City of Belvidere*, 181 Ill. 2d at 205.

Section 201(c) of the Income Tax Act imposes a "personal property tax replacement income tax" on "the privilege of earning or receiving income" in Illinois. 35 ILCS 5/201(c) (West 1994). Section 201(e) provides a credit against the personal

property replacement income tax for investments in "qualified property." 35 ILCS 5/201(e) (West 1994). The statute defines "qualified property," in pertinent part, as property "used in Illnois by a taxpayer who is primarily engaged in manufacturing, or in mining coal or fluorite, or in retailing." 35 ILCS 5/201(e)(2)(D) (West 1994). This section lastly provides: "For purposes of this subsection (e), the term 'retailing' means the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities." 35 ILCS 5/201(e)(3) (West 1994). The issue in this case is whether electricity is "tangible personal property." If so, then Exelon's business of selling electricity constitutes "retailing" as defined by section 201(e), thereby qualifying Exelon for the tax credit. The Income Tax Act does not define the term "tangible personal property."

The Department and the appellate court considered this court's analysis in *Farrand Coal* to be dispositive of Exelon's claim for a section 201(e) tax credit. In *Farrand Coal*, this court considered the meaning of the phrase "tangible personal property" in the context of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, ch. 120, par. 440 *et seq.*). In the Retailers' Occupation Tax Act at that time, as in the Income Tax Act before us, the legislature used the word "tangible" to define the term "retail" without defining the word "tangible." Assuming that the words had their ordinary and popular meaning, this court referred to Webster's, which defined "tangible" as:

> "'Capable of being touched; also, perceptible to the touch; tactile; palpable.' [Citation.]
>
> The same dictionary gives the law definition of the term 'tangible property' as 'Corporeal property either real or personal' and defines 'corporeal' as meaning 'Of the nature of, consisting of, or pertaining to, matter or a material body; physical; bodily; material;–opposed to spiritual or immaterial *** Tangible or palpable.'" (Emphases omitted.) *Farrand Coal*, 10 Ill. 2d at 511, quoting Webster's New International Dictionary (2d ed. 1946).

This court has adhered to this definition of "tangible." See *First National Bank of Springfield v. Department of Revenue*, 85 Ill. 2d 84, 88 (1981). Exelon agrees with the Department and the appellate court that this definition of "tangible" should be used in construing section 201(e).

However, Exelon contends that neither the Department nor the appellate court conducted the second tier of the analysis this court described in *Van's Material*, which applies the definition of "tangible" to the facts of this case. Rather, according to Exelon, the Department and the appellate court relied on *Farrand Coal* in concluding, as a matter of law, that electricity is not tangible personal property. Indeed, the appellate court observed that it was "bound by the principle of *stare decisis* and must adhere to the decisions of our supreme court." 376 Ill. App. 3d at 922. Exelon assigns error to this conclusion. Exelon

argues that *Farrand Coal* concerned the tangibilty of coal, not electricity, and that this court's few comments regarding electricity were *dicta*.

Obiter dictum refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993); *Department of Public Works & Buildings v. Butler Co.*, 13 Ill. 2d 537, 545 (1958). As more fully stated: "A dictum is 'any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication.'" *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988), quoting *Stover v. Stover*, 60 Md. App. 470, 476, 483 A.2d 783, 786 (1984). There are several indications that a particular statement or passage in a prior opinion may be *dictum*:

> "One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion–it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered." *Crawley*, 837 F.2d at 292.

See *People v. Young*, 365 Ill. App. 3d 753, 770-71 (2006) (citing *Crawley*). In contrast, "an expression

of opinion upon a point in a case argued by counsel *and deliberately passed upon by the court*, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*. (Citations.) And further, a judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous." (Emphasis added.) *Cates*, 156 Ill. 2d at 80. We agree with Exelon that this court's references to the tangibility of electricity in *Farrand Coal* were *obiter dicta*.

In *Farrand Coal*, the plaintiff coal company attempted to avoid paying sales tax imposed under the Retailers' Occupation Tax Act on the sale of coal to the city of Springfield, which operated an electric utility company. The coal company paid the sales tax under protest and sought to enjoin the Director of Revenue from collecting the payments. The circuit court dismissed the coal company's complaint, and the coal company appealed. *Farrand Coal*, 10 Ill. 2d at 507-08. The tax was payable on a sale of " 'tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property.' " *Farrand Coal*, 10 Ill. 2d at 510, quoting Ill. Rev. Stat. 1955, ch. 120, par. 440. The coal company characterized its sale of coal as a sale for resale not subject to sales tax. It argued that what it actually sold was not the coal itself, but rather the "energy" stored in the coal, and that the electric utility bought the "energy" in the coal to convert it to electric "energy" and resell it. The coal company alleged "that the energy sold by the utility is the same energy it purchased, though changed in form into electrical

energy; that the energy in the coal constitutes an ingredient or constituent or material of the electrical energy." *Farrand Coal*, 10 Ill. 2d at 508.

This court viewed the issue presented in *Farrand Coal* as follows:

> "The basic issue to be resolved in determining this case is whether, under the act in question, *coal* is sold as tangible personal property to the utility for use or consumption and not for resale and is therefore the measure of a taxable retail sale, or whether energy, as tangible personal property, is bought in the form of *coal*, extracted therefrom, processed and resold as tangible personal property in the form of electrical energy." (Emphases added.) *Farrand Coal*, 10 Ill. 2d at 509–10.

This court made clear that the coal company's *coal* was the focus of the case and not the electric company's electricity:

> "It seems patently clear that plaintiff is engaged in the business of selling *coal* to utilities. Such *coal* constitutes tangible personal property within the popular meaning of that term as used in the act in question. The *coal* is used by the utility to generate electrical energy. Such use is by the burning or combustion of the *coal*. When burned, the *coal* is gone except for the ash residue. It is difficult to perceive how there could be a more complete use or consumption of the *coal* within the meaning of the act.

> Clearly plaintiff coal company has sold tangible personal property to the utility for use or consumption." (Emphases added.) *Farrand Coal*, 10 Ill. 2d at 513.

This was the dispositive reasoning of *Farrand Coal*. Indeed, affirming the circuit court, this court held: "*Coal* was sold as tangible personal property to the utility for use or consumption and not for resale within the meaning of the Retailers' Occupation Tax Act and is therefore the measure of a taxable retail sale." (Emphasis added.) *Farrand Coal*, 10 Ill. 2d at 513. In *Farrand Coal*, this court never had to–and never did–address definitively the issue of whether electricity is tangible.

The Department characterizes this view of *Farrand Coal* as "myopic." The Department argues that "whether electricity was tangible personal property was critical to the plaintiff's case." In *Farrand Coal*, the coal company included in its contention the following allegation and reasoning:

> "that the energy purchased by the utility and also the electrical energy sold by the utility are both tangible personal property; that since the energy purchased by the utility is tangible personal property and the same energy is resold by the utility to its customers, the energy is not used or consumed by the utility." *Farrand Coal*, 10 Ill. 2d at 508.

Therefore, according to the coal company, the sale of "energy" to the electric utility was not subject to sales tax. *Farrand Coal*, 10 Ill. 2d at 508-09.

The court in *Farrand Coal* rejected the coal company's arguments. The court observed:

> "From the evidence it appears that although energy and mass are closely interrelated, indestructible, equivalent, interchangeable, directly proportional to and may be equated with each other, yet energy as such cannot be separated from mass or matter and stored, weighed, transported, handled, liquified, solidified, photographed, touched or otherwise perceived by the senses in its own right or capacity separate and apart from mass or matter. All witnesses who testified on the subject, including plaintiff's witnesses, agreed that energy cannot be separated from matter and tagged or otherwise physically identified in any way, cannot be located spatially, and does not have dimensions. In all these respects energy falls short of fitting into the ordinary and popularly understood meaning of the word 'tangible' as used by the General Assembly in the act in question." *Farrand Coal*, 10 Ill. 2d at 511.

This court then concluded its analysis by focusing on the consumption of coal and not the tangibility of electricity. *Farrand Coal*, 10 Ill. 2d at 513.

However, in a three-paragraph passage, this court also recounted several cases in support of its observation that the court had "at no time held electricity to be 'tangible' personal property." *Farrand Coal*, 10 Ill. 2d at 512. This passage was *obiter dicta*. Since this court rejected the coal

cornpany's argument that energy was "trapped" in the coal, the court had no need to–and did not–deliberately consider whether electricity is "tangible." The passage refers to *Peoples Gas Light & Coke Co. v. Ames*, 359 Ill. 152 (1934), in which this court concluded that a "decision as to whether or not electricity was tangible personal property was expressly declined as unnecessary to a disposition of the case." *Farrand Coal*, 10 Ill. 2d at 512. This court specifically mentioned *People v. Menagas*, 367 Ill. 330 (1937), in which this court held that electricity was personal property and, therefore, could be the object of larceny under the Criminal Code. The State "conceded" that electricity was intangible (*Menagas*, 367 Ill. at 332-33), and the court so assumed (*Menagas*, 367 Ill. at 338). The acknowledgment of an assumption does not constitute a holding. See 20 Am. Jur. 2d Courts § 134, at 517 (2005) (stating that "a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced"). Lastly, the passage refers to *People ex rel. Mercer v. Wyanet Electric Light Co.*, 306 Ill. 377 (1922), in which this court held that "electric utility companies are neither manufacturing nor mercantile companies so as to have their capital stock assessed locally instead of by the State assessing authority." *Farrand Coal*, 10 Ill. 2d at 512. Indeed, this holding actually comports with our modern, common understanding of electric utility companies. An electric utility company is not a purely manufacturing or mercantile company. Rather, it belongs to that unique class of corporations known as public

utilities. *Wyanet Light*, 306 Ill. at 380-81; see L. Hyman, A. Hyman & R. Hyman, America's Electric Utilities: Past, Present and Future 89 (7th ed. 2000) (explaining that an electricity supplier must perform the following functions to deliver the product: production, marketing, transmission, distribution, metering and billing, and retail supply).

We reject the argument that this court's discussion of electricity in *Farrand Coal* was beyond mere *obiter dicta*. The above–referenced language in *Farrand Coal* was overly broad and not necessary to its holding. This three–paragraph passage was clearly unnecessary to the outcome of *Farrand Coal*. It was redundant in that it can be sloughed off without damaging the analytical structure of the opinion. See *Crawley*, 837 F.2d at 292. Further, the passage in *Farrand Coal* was not judicial *dictum*. Although this issue was briefed, this court did not deliberately rule upon the point. See *Cates*, 156 Ill. 2d at 80. Rather, the passage was uttered as an aside. See *Department of Public Works*, 13 Ill. 2d at 545.

Of course: "Even *obiter dictum* of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court." *Cates*, 156 Ill. 2d at 80. Therefore, in this case, it was reasonable for the appellate court to consider itself bound by this court's discussion of the tangibility of electricity in *Farrand Coal*. 376 Ill. App. 3d at 922.

However, in construing legislation that lacks statutory definitions, this court cannot ignore the

laws of physics as humanity has come to understand them. See, *e.g., Marzullo v. Kahl*, 366 Md. 158, 191, 783 A.2d 169, 188 (2001) (observing that courts "do not set aside common experience and common sense when construing statutes").

In his recommended decision, the ALJ acknowledged that "neither party disputes the properties of electricity." The record in the present case contains the unrebutted affdavit and report of Dr. Fajans, entitled "The Physical Nature of Electricity." He defined electricity as the flow of electrons in a circuit. Dr. Fajans explained: "Electricity is physical and material because, microscopically, it consists of the flow and 'pressure' of a material entity, namely electrons, and macroscopically, it can be sensed (felt, tasted, seen, and heard), measured, weighed, and stored, and is subject to universal laws of nature." Dr. Fajans elaborated as follows:

> "Without electrons, electricity cannot be transmitted. Though electrons themselves are very small and lightweight, they are one of the basic constituents of matter; common matter like hydrogen or ion consists of electrons, protons, and neutrons in roughly equal number. Recently, scientists have been able to see electrons, or more precisely, the density of electrons, with devices called Scanning Tunneling Microscopes. * * * There is nothing more physical and material than an electron. Since electricity itself consists of the flow of a material object, electricity is physical and material."

Dr. Fajans further explained that electricity can be felt:

> "You feel electricity every time you get a shock. Static shocks, from things like walking across a carpet on a dry day, are annoying, but almost always harmless. Electrical sensations from power lines range from the vibratory feeling that you may experience while gently running your fingertips over an improperly wired lamp, to the tingling feeling that you get if you touch the wires inside an electrical outlet with dry hands, to the strong twitch, pain and weakness you get from touching an outlet with wet hands, to extreme pain in more dangerous circumstances."

As a sister court observed: "The word 'intangible' from its Latin roots means something that cannot be touched or perceived by touch. [Webster's Third New International Dictionary 1173 (1993).] Electricity can be touched, and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she feels." *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725, 728 n.6 (Mo. 2001). Dr. Fajans' report reflects the currently understood electron theory of electricity. See, *e.g.*, L. Hyman, A. Hyman & R. Hyman, America's Electric Utilities: Past, Present and Future 15-19 (7th ed. 2000); see generally S. Gibilisco, Teach Yourself Electricity and Electronics 3 (4th ed. 2006) (explaining: "It is important to understand some simple general physics principles in order to have a full grasp of

electricity and electronics"); S. Herman, Delmar's Standard Textbook of Electricity (1993); D. Bodanis, Electric Universe: The Shocking True Story of Electricity (2005) (tracing understanding of electricity from mysterious force to flowing electrons).

This court's *dicta* in *Farrand Coal* regarding the tangibility of electricity was based on our scientific knowledge of over half a century ago and was skewed by the true issue presented in that case. Our current understanding of electricity has progressed beyond that time. We need not address the parties' alternative statutory construction arguments. We now join the several courts that have expressly held in varying contexts that electricity constitutes "tangible personal property." See, *e.g., Searles Valley Minerals Operations, Inc. v. State Board of Equalization*, 160 Cal. App. 4th 514, 521, 72 Cal. Rptr. 3d 857, 862 (2008); *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 97-98 (R.I. 2006); *Davis v. Gulf Power Corp.*, 799 So. 2d 298, 300 (Fla. Dist. Ct. App. 2001); *Curry v. Alabama Power Co.*, 243 Ala. 53, 59-60, 8 So. 2d 521,526 (1942).[1]

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[1] Our construction of "tangible personal property" in section 201(e) of the Income Tax Act is based on our current understanding of the tangibility of electricity. Of course, the General Assembly may define this term to include or exclude electricity as it chooses. Where the legislature defines a particular statutory term, a court is bound by the definition as long as it is reasonable. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 275 (1998).

2. Is Exelon Primarily Engaged in "Retailng"?

The parties agree that if electricity is "tangible personal property," then Exelon would be engaged in "retailing" as defined by section 201(e). We have held that electricity is "tangible personal property" and, accordingly, hold that Exelon is a retailer as defined by section 201(e). The second tier of the analysis described in *Van's Material* concerns whether Exelon satisfies the statutory requirements for a section 201(e) tax credit. See *Van's Material*, 131 Ill. 2d at 201-02. The parties chose to litigate Exelon' s claim by means of cross-motions for summary judgment, by which they agree that no factual issues exist and that the case presents only the need to resolve the legal issue. See, *e.g., Board of Trustees of Southern Illinois University v. Department of Human Rights*, 159 Ill. 2d 206, 210 (1994); *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). Accordingly, our determination of that legal issue is conclusive. Based on our interpretation of section 201(e) of the Income Tax Act, we hold that the Department's denial of Exelon's claim for a section 201(e) tax credit was erroneous as a matter of law.

"It remains the mandate of this court that constitutional issues be considered only when the case may not be decided on nonconstitutional grounds." *Mulay v. Mulay*, 225 Ill. 2d 601, 611 (2007). Our disposition of this cause obviates the need to determine whether the Department violated the uniformity clause of the Illinois Constitution (Ill. Const. 1970, art. IX, §2). See, *e.g., Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167,

185 (2003); *Bonaguro*, 158 Ill. 2d at 399. Notably, our concurring or dissenting colleague likewise does not consider it necessary to determine this constitutional issue. He does not indicate whether he would ultimately affirm the judgment of the appellate court, or would ultimately concur in our reversal of the appellate court judgment.

III. CONCLUSION

For the foregoing reasons, the judgments of the appellate court and the circuit court of Cook County are reversed, the decision of the Department of Revenue is set aside, and the cause remanded to the Department with directions to grant the section 201 (e) tax credit to Exelon.

Judgments reversed;

decision set aside;

cause remanded with directions.

JUSTICE BURKE took no part in the consideration or decision of this case.

JUSTICE THOMAS, dissenting:

My colleagues are firmly convinced that they have the science of this issue correct. Unfortunately, science does not answer the question before the court, and the majority has its history and its law wrong. Consequently, I cannot join its opinion.

Two fundamental misunderstandings underlie and inform the majority opinion. The first is the mistaken belief that the central question we must resolve is whether a majority of this court believes that electricity is tangible at the subatomic level and *not* whether the legislature intended to include electricity within the meaning of "tangible personal property" when it enacted the tax credit in question. The Department has correctly and persuasively argued that the legislature could not have so intended. The second is a misunderstanding of *Farrand Coal* so profound that the majority can cast aside as *obiter dicta* this court's discussion of an issue that was (a) central to the plaintiff's case; (b) litigated in the trial court; and (c) fully briefed and argued on appeal. I will demonstrate below that such a position is not only indefensible but directly contrary to this court's precedents. After demonstrating why *Farrand Coal*'s discussion of the tangibility of electricity was not *obiter dicta*, I will set forth both why we should not abandon *Farrand Coal* and why the majority's reasons for doing so are wholly invalid.

I. *OBITER DICTA*

A. *Dicta* or Holding?

The majority correctly sets forth the distinction between *obiter dictum and judicial dictum*. In *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993), this court explained that *obiter dictum* is a "remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or

precedent within the *stare decicis* rule."[2] Slip op. at 8. "On the other hand, an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*." *Cates*, 156 Ill. 2d at 80. Because *obiter dicta* lies outside the *stare decisis* rule, the distinction between *obiter dicta* and judicial *dicta* is an important one. On the other hand, because judicial *dicta* has the force of a judicial determination and is entitled to much weight (*Cates*, 156 Ill. 2d at 80), the distinction between judicial *dicta* and a holding of the court is less important.

The majority, however, gives insufficient consideration to what discussions in opinions may not be considered *dicta* in the first place. A good summary appears in Corpus Juris Secundum:

> "An adjudication on any point within the issues presented by a case is not dictum. This rule applies as to all pertinent questions, although they might be only incidentally involved, which are presented and decided in the regular course of the consideration of the case, and lead to the

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[2] The majority states that it agrees with Exelon that this court's references to the tangibility of electricity in *Farrand Coal* were *obiter dicta*. Slip op. at 9. It should be noted, however that Exelon merely used the generic term *dicta* and did not state that the discussion was *obiter dicta*. The Department responded by arguing that the discussion was not *dicta*, but that, even if it was, it was judicial *dicta*.

> final conclusion, and to any statement in the opinion as to a matter on which the decision is predicated. Accordingly, a point expressly decided does not lose its value as a precedent because the disposition of the case is or might have been made on some other ground. Similarly, if a case presents two or more points, any one of which is determinative of the ultimate issue, but the court actually decides all of them, the case is an authoritative precedent on every point decided, and none of the points may be regarded as dictum. One point should not be denied authority merely because another point was more fully argued and considered, nor does a decision on one proposition make statements of the court regarding other propositions dicta." 21 C.J.S. *Courts* §229, at 227 (2006).

With these principles in mind, let us now turn to *Farrand Coal*'s discussion of the tangibility of electricity.

At issue in *Farrand Coal* was the desire of the plaintiff coal company not to pay the retailers' occupation tax. The coal company was being taxed on its sales of coal to an electric utility. The tax in question was imposed "'upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." See *Farrand Coal*, 10 Ill. 2d at 510. The statute defined "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption *and not for resale in any form*

as tangible personal property." (Emphasis added.) Ill. Rev. Stat. 1955, ch. 120, par. 440. The statute further provided that, "Sales of tangible personal property, which property as an ingredient or constituent goes into and forms *a part of tangible personal property subsequently the subject of a 'sale at retail,'* are not sales at retail as defined in this Act." (Emphasis added.) Ill. Rev. Stat. 1955, ch. 120, par. 440. The position of the Department was that the coal company was selling tangible personal property (coal) to the electric utility for use or consumption, and, consequently, it was required to pay the tax. The coal company argued that it was exempt from paying the tax under the statute's exception for tangible personal property resold by the purchaser. The coal company argued that the energy in the coal that it sold to the utilty was resold by the utility as tangible personal property—electric energy. In its brief in *Farrand Coal*, the Department summarized what would be necessary for the coal company to prevail:

> "For the plaintiff to prevail, it must be determined: First, that energy is tangible personal property; second, that electrical energy is merely a modified form of energy which can be proved to have been extracted from the coal, *and third that the transaction between the utility and its customers actually is a sale of electrical energy as tangible personal property* and not merely the selling of the work and service which the electrical energy can perform and furnish. Failure by the plaintiff to establish any one

> (not all, but any one) of these points will defeat the plaintiff's whole case and make a decision in the defendants' favor necessary." (Emphasis added.) *Farrand Coal*, defendant's brief at 61.

Consequently, both the plaintiff and the defendants presented extensive scientific testimony on the issues of whether energy and electricity are tangible personal property. The experts for the plaintiff included an associate professor of physics from Purdue University, a Ph.D. in physics in the institute for nuclear studies at the University of Chicago, a second physics professor from the University of Chicago, and the general superintendent for the utility, who was an engineering graduate from Purdue. The defense witnesses included a professor of physics from the University of Illinois and a professor of mining and metallurgical engineering from Washington University. *Farrand Coal*, 10 Ill. 2d at 509. The scientific testimony covered the better part of two full days. *Farrand Coal*, 10 Ill. 2d at 509. The plaintiff and the defendants disagreed as to whether: (1) electrical energy is merely energy in coal in a changed form; and (2) electricity is tangible personal property. *Farrand Coal*, 10 Ill. 2d at 509. The briefs cover in great detail the scientific testimony offered on whether energy and electricity are tangible personal property, and the parties presented extensive appellate arguments on these points.

It is not necessary, however, for one to have read the briefs in *Farrand Coal* to understand that this

court's discussions of the tangibility of energy and electricity were not *dicta*. Afer all, *Farrand Coal* set forth the statute in question. See *Farrand Coal*, 10 Ill. 2d at 510. Moreover, it detailed the coal company's argument that the electric energy sold by the utility was tangible personal property. See *Farrand Coal*, 10 Ill. 2d at 508. It also set forth that the coal company's theory of the case was that "energy, as tangible personal property, is bought in the form of coal, extracted therefrom, processed and resold as tangible personal property in the form of electrical energy." *Farrand Coal*, 10 Ill. 2d at 509-10. Thus, it is apparent from the face of the decision that a showing that the electric utility was selling tangible personal property to its customers was essential to the coal company's claim and that the point was argued by the parties. Indeed, had the coal company not argued that the electric utility was selling tangible personal property to its customers, the Department would have been entitled to a judgment on that basis alone.

The *Farrand Coal* court ultimately addressed all parts of the parties' claims. The court agreed with the Department that the coal company sells tangible personal property (coal) to the utility and that the coal is used or consumed by the utility. *Farrand Coal*, 10 Ill. 2d at 513. The court rejected plaintiff's arguments that it is really selling energy in the coal and that the energy is resold as electric energy by the utility. *Farrand Coal*, 10 Ill. 2d at 513. The court explained that (1) energy is intangible (and this holding would necessarily encompass electric energy) (*Farrand Coal*, 10 Ill. 2d

at 511); (2) energy cannot be separated from matter *Farrand Coal*, 10 Ill. 2d at 511); and (3) the electric utility is not selling tangible personal property to its customers (*Farrand Coal*, 10 Ill. 2d at 512-13).

Accordingly, there is no possible basis for casting aside this court's discussion of any of these issues as merely comments made "by the way" or as asides. Rather, they were points essential to the case, deliberately argued by counsel, and passed upon by the court. Every point that the court discussed in *Farrand Coal* was directly relevant to whether the exception for tangible personal property resold by the purchaser was applicable. Consequently, no part of the court's opinion may be considered *dicta*, even if any one of the points discussed could have alone supported the court's decision. 21 C.J.S. *Courts* §229, at 227 (2006); *Woods v. Interstate Realty Co.*, 337 U. S. 535, 537, 93 L. Ed. 1524, 1526, 69 S. Ct. 1235, 1237 (1949).[3]

The majority supports its erroneous conclusion that this passage from *Farrand Coal* was *dicta* by selectively quoting from a Seventh Circuit opinion,

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[3] The majority attempts to downplay the significance of the tangibility of electricity discussion by twice referring to it as a "three-paragraph passage." Slip op. at 11, 12. It should be noted that this was the longest discussion in *Farrand Coal*. See *Farrand Coal*, 10 Ill. 2d at 510-13. Moreover, the majority neglects to mention that by focusing on these three paragraphs, it is leaving out: (1) the express holding that energy is intangible (*Farrand Coal*, 10 Ill. 2d at 511); and (2) the express holding that the sale of electrical energy by a utility is not a sale at retail of tangible personal property (*Farrand Coal*, 10 Ill. 2d at 513).

United States v. Crawley, 837 F.2d 291 (7th Cir. 1988). According to the majority, the discussion of the tangibility of electricity was not "necessary" to the outcome of the case because it could be sloughed off without damaging the analytical structure of the opinion. Slip op. at 12. There are several problems with this assertion. First, a fuller statement of the principle the majority is thinking of is that *dicta* is "an opinion expressed by a judge on a point not necessarily arising in the case, or a statement in an opinion *not responsive to any issue* and not necessary to the decision of the case." (Emphasis added.) 21 C.J.S. *Courts* §227, at 224-25 (2006). Second, far from supporting the majority's conclusion, *Crawley* shows why the majority's understanding of *dicta* is incorrect. In *Crawley*, the Seventh Circuit considered whether a prior opinion had changed the standard of proof in probation-revocation cases. The court had consistently held that the court could revoke probation if reasonably satisfied that the probationer had violated a condition of his probation. In one opinion, *United States v. Yancey*, 827 F.2d 83 (7th Cir. 1987), the court stated that the proof in the case satisfied the preponderance of the evidence standard. In subsequent cases, the court continued to apply the "reasonably satisfied standard." Rather than simply stating that the statement in *Yancey* was a mistake or that later decisions controlled, the court endeavored to demonstrate that *Yancey's* statement was *dicta*. The court listed several definitions of the word *dicta*, including that *dicta* is " 'a statement *not addressed to the question before the court* or necessary for its decision.' " (Emphasis

added.) *Crawley*, 837 F .2d at 292, quoting *American Family Mutual Insurance Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175, 178 (1984). The court also stated that " '[t]he basic formula [for distinguishing holding from *dictum*] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them.' " *Crawley*, 837 F.2d at 292, quoting *United Steelworkers of America, Local 8599 v. Board of Education of the Fontana Unified School District*, 162 Cal. App. 3d 823, 834, 209 Cal. Rptr. 16, 21 (1984). The court then stated that a different approach for identifying *dicta*, since the definitions are inconsistent, is to ask what is at stake in the definition. The court then adopted the following approach:

> "What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. So instead of asking what the word 'dictum' means we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion. There are many. One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion–it can be sloughed off without damaging the analytical structure of the

> opinion, and so *it was a redundant part of that opinion* and, again, may not have been fully considered. *Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation.* All these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement, that it was not likely to be relied on by readers, and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court)." (Emphases added.) *Crawley*, 837 F.2d at 292-93.

The court ultimately concluded that *Yancey*'s statement about the preponderance standard was *dicta* because the issue of the proper standard *had not been raised in that case* and, since the evidence satisfied the higher preponderance standard, the court had no occasion to consider whether the defendant's probation should have been revoked based on the lower "reasonably satisfied" standard. Thus, the court was dealing with a single sentence on an issue that had not been briefed or argued. What in the above discussion suggests that the Seventh Circuit would consider as *dicta* a discussion that was not only the longest discussion in an opinion but also addressed an issue that was (1) fully briefed by the parties (even more

extensively than in the present case); (2) directly relevant to whether the statute applied; (3) essential to the plaintiff's case, and (4) the only part of the discussion that grounded the court's analysis in the court's precedents? The discussion to which the majority refers was *not* redundant and removing it absolutely would have damaged the analytical structure of the opinion. If we ignore for the moment the fact that "sloughing off" this analysis would *still* leave the holdings that energy is intangible and that electric utilities are not retailers of tangible personal property intact, without this analysis, none of the court's precedents would have been discussed. The court obviously considered it important to point out that the coal company's arguments had no support in this court's precedents and that all contrary out-of-state authority on the issue was distinguishable.

Moreover, the majority's view of what it means for something to be "necessary" for a court's decision would necessarily render vast amounts of supreme and appellate court case law mere *dicta*. According to the majority, the discussion of the tangibility of electricity or electrical energy was *dicta* because the court had already given another reason for holding that the statutory exception did not apply. Slip op. at 11. But this would necessarily mean that in *every* case in which a court gives more than one reason for its holding, only the first reason would be a judicial determination and all other reasons would be mere *dicta*. Not only is this not the law (see *Woods*, 337 U.S. at 537, 93 L. Ed. at 1526, 69 S. Ct. at 1237 ("where a decision rests

on two or more grounds, none can be relegated to the category of *obiter dictum*"); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 68 L. Ed. 1110, 44 S. Ct. 621 (1924) (same); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 72 L. Ed. 303, 48 S. Ct. 194 (1928) (reason for court's conclusion is not *obiter dictum* merely because another reason was more fully argued and considered)), it is terrible as policy. The majority's position will mean that a court wishing to give several reasons for its holding will either have no incentive to do so or will not be able to list the reasons in the most logical sequence. Rather, the court will have to choose what reason it wants to be binding precedent and put that discussion first.

It appears that the majority might be confusing the analysis in *Farrand Coal* with the situation in which the resolution of one issue substantively precludes resolution of the other. Corpus Juris Secundum gives two examples of what it means for a court's discussion to be unnecessary to the decision:

> "For instance, once a court determines that a statute does not apply to a case, any statement concerning the statute's constitutionality is dictum. Similarly, when a court dismisses a case for lack of jurisdiction, any further discussion of the merits is dictum." 21 C.J.S. *Courts* §227, at 225 (2006).

This makes perfect sense. A court cannot rule on the constitutionality of a statute that is not before it, nor can the court rule on the merits of a case

over which it lacks jurisdiction. But there is no reason why a court may not give several reasons why a statute does not apply to a case, and there is no "one and done" rule rendering every reason after the first one *obiter dicta*. The majority bases its *dicta* holding not on any legitimate substantive reason, but simply on the manner in which Justice Bristow chose to structure his opinion.

In sum, there is no *dicta* in *Farrand Coal*. The court's opinion in that case is a concise, to-the-point analysis, giving several reasons why the statutory exception for tangible personal property resold by the purchaser does not apply. Every sentence in the court's opinion is directly relevant to that issue and is responsive to a point put in contention by the parties.

B. Judicial *Dicta* or *Obiter Dicta*?

Even if we assume for the sake of argument that the court's discussion of the tangibility of electricity was *dicta*, for all of the reasons set forth above, it could only be judicial *dicta*. As this court explained in *People v. Williams*, 204 Ill. 2d 191, 206 (2003):

> "*Dicta* normally comes in two varieties: *obiter dicta* and judicial *dicta*. *Obiter dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case. Black's Law Dictionary 1100 (7th ed. 1999). Judicial *dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. Black's Law Dictionary 465 (7th ed. 1999)."

Or, as stated in *Cates*, the relevant question in determining whether dicta is *obiter dicta* or judicial *dicta* is to what extent the issue was before the court. *Cates*, 156 Ill. 2d at 81. The tangibility of electricity could not have been more central or relevant to the issue in *Farrand Coal*, and the issue was litigated in the trial court and briefed extensively on appeal.

The majority does not attempt to argue that this issue was not before the court in *Farrand Coal*. Instead, the majority seizes on the statement in *Cates* that judicial *dicta* is an expression of an opinion on a point argued by the parties and *deliberately passed upon* by the court, but not essential to the disposition of the case. *Cates*, 156 Ill. 2d at 80. The majority claims that the issue was not "deliberately passed upon," and therefore the discussion was not judicial *dicta*. To reiterate: in *Farrand Coal*, this court held that energy is intangible. *Farrand Coal*, 10 Ill. 2d at 511. This holding necessarily applies to electrical energy. The defendants in *Farrand Coal*, when arguing that electrical energy is intangible, incorporated by reference their arguments about energy in general, noting that "if energy is intangible, electric energy (which is just a form of energy) is necessarily intangible. *Farrand Coal*, defendants' brief at 35-36. The court then explained that any argument that electricity is tangible finds no support in this court's case law and all out-of-state opinions holding it to be tangible are distinguishable. *Farrand Coal*, 10 Ill. 2d at 512. The court summed up by holding that the sale of electrical energy by

an electric utility is not a sale at retail of tangible personal property. *Farrand Coal*, 10 Ill. 2d at 513. So, according to the majority, holding that all energy is intangible, that any argument that electricity is tangible finds no support in this court's case law, that all out-of-state cases that hold electricity to be tangible are distinguishable, and that the sale of electrical energy is not a sale at retail of tangible personal property is not "deliberately passing" upon the question. Clearly, *obiter dicta* is now whatever this court wants it to be. Should it be any surprise that *no* court to consider *Farrand Coal* thought that this court was merely making comments as asides when it addressed this question? See *Waukegan Community Unit School District No. 60 v. City of Waukegan*, 95 Ill. 2d 244, 253 (1983) (citing *Farrand Coal* for the proposition that public utilities are in the business of rendering a service rather than in selling tangible personal property); 376 Ill. App. 3d at 921-23 (*Farrand Coal* classified electricity as intangible property); *Electric Energy, Inc. v. Hamer*, 373 Ill. App. 3d 733, 736 (2007) (citing *Farrand Coal* for the proposition that "the sale of electricity is the sale of a service"); *Union Coal Co. v. Department of Revenue*, 38 Ill. App. 3d 293, 294 (1976) ("In the *Farrand* case the court held an electric utility company does not sell tangible personal property when it sells electricity or electrical energy"). Ironically, it appears that the majority believes that *Farrand Coal* passed upon the question too. The majority states that it was reasonable for the appellate court to consider itself bound by *Farrand Coal* (slip op. at 12), but that we

are now abandoning that case because our scientific understanding has progressed since that case was decided (slip op. at 14). These statements make sense only if *Farrand Coal* did pass upon the question.

Because there is *no* legitimate debate as to whether this court's discussion of the tangibility of electricity was "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court" (*Cates*, 156 Ill. 2d at 80), the majority opinion represents a clear and unequivocal repudiation of *Cates* and its progeny. Clearly, there is no longer a distinction in Illinois between judicial *dicta* and *obiter dicta*. Because the distinction that *Cates* drew is an important and valid one that has been applied by this court and other courts for years, I believe that any overruling of this precedent should be explicit and include a discussion of why it is appropriate to depart from *stare decisis*. *Cates* is too important and well established to be overruled *sub silentio*.

C. What *Farrand Coal* Was Not About

Next, I must briefly point out what was *not* the issue in *Farrand Coal*. The majority notes that Exelon argues that *Farrand Coal* concerned the tangibility of coal, not electricity. Slip op. at 8. Because the majority does not repudiate this obviously false statement, it is unclear if this argument influenced the majority's erroneous conclusion that the discussion of the tangibility of electricity was *dicta*. *Of course* the issue in *Farrand Coal* was not whether coal is tangible. In the first place, who would argue that coal is *in*tangible?

Such an assertion would be preposterous on its face and almost certainly would never be the focus of a supreme court opinion. In fact, such a position would be so absurd that even anyone who had never read *Farrand Coal* would have a pretty good idea that this could not have been the issue in that case.

Second, *why* would anyone have argued that coal is intangible? Such a position would have been fatal to both parties' cases. Both parties needed coal to be tangible for their arguments to succeed. The Department wanted to tax the plaintiff on the basis that its sale of coal was a sale of tangible personal property. In the coal company's effort to avoid paying this tax, it argued that its sale of tangible personal property was actually a sale of the energy in the coal. The coal company argued that if we start out with something tangible–coal–then whatever makes up the coal must also be tangible. Thus, the energy in the coal is tangible. *Farrand Coal*, plaintiffs brief at 25. The tangibility of coal was assumed and conceded by both parties as a necessary component of their respective positions, and the issue before the court was *not* whether coal is tangible. If this was indeed the true issue in *Farrand Coal*, it is interesting that it was never discussed in the opinion. See *Farrand Coal*, 10 Ill. 2d at 510-13.

Regardless of whether *Farrand Coal*'s discussion of the tangibility of electricity was a holding or judicial *dicta*, it is entitled to much weight and any departure therefrom requires a discussion of *stare decisis*. I will next discuss why compelling reasons

exist not to depart from this court's precedents, following which I will demonstrate that the majority's reasons for doing so cannot survive a moment's scrutiny.

II. *STARE DECISIS*

The principles underlying *stare decisis* were well stated by Justice Freeman in his impassioned dissent in *People v. Mitchell*, 189 Ill. 2d 312 (2000):

> "The term *stare decisis* is derived from the Latin phrase *stare decisis et non quieta moevre*, which translates' "to stand by matters that have been decided and not to disturb what is tranquil." ' , J. Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 Buff. L. Rev. 187, 189 (1994), quoting Dictionary of Foreign Phrases and Abbreviations 187 (K. Guinach trans., 3d ed. 1983). This principle was engrafted in English jurisprudence, having been recognized by Sir William Blackstone, who acknowledged that ' "precedents and rules must be followed, unless flatly absurd or unjust." ' J. Stein, *The Hobgoblin Doctrine: Identifying 'Foolish' Consistency in the Law*, 29 Tex. Tech. L. Rev. 1017, 1019 (1998) quoting 1 W. Blackstone, Commentaries *70. In American jurisprudence, *stare decisis* reflects a ' "policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " ' *State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 212-13, 118

> S. Ct. 275, 284 (1997), quoting *Agostini v. Felton*, 521 U.S. 203, 235, 138 L. Ed. 2d 391, 422, 117 S. Ct. 1997, 2016 (1997), quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 76 L. Ed. 815, 823, 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting, joined by Roberts and Cardozo, JJ.). As the United States Supreme Court has observed, the judiciary prefers this doctrine because it 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2609 (1991).

This court, too, has voiced similar sentiments. Long ago in *Prall v. Burckhartt*, the court observed that the rule of *stare decisis*

> 'is founded largely on considerations of expediency and sound principles of public policy, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument, and the courts are slow to interfere with the principle announced by the decision and it may be upheld even though they would decide otherwise were the question a new one.' *Prall v. Burckhartt*, 299 Ill. 19, 41 (1921).

> In light of the foregoing, this court has recognized that the doctrine, while not inviolable, demands that it be overturned 'only on the showing of good cause.' *Heimgaertner v. Benjamin Electric Manufacturing Co.*, 6 Ill. 2d 152, 167 (1955)." *Mitchell*, 189 Ill. 2d at 363-64 (Freeman, J., dissenting, joined by Harrison, C.J., and McMorrow, J.).

Moreover, as both the United States Supreme Court and this court have explained, *stare decisis* considerations are at their apex in statutory construction cases. In *Neal v. United States*, 516 U.S. 284, 295-96, 133 L. Ed. 2d 709, 719-20, 116 S. Ct. 763, 769 (1996), the Supreme Court stated the following:

> "Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.' *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). Absent

> those changes or compelling evidence bearing on Congress' original intent, *NLRB v. Longshoremen*, 473 U.S. 61, 84 (1985), our system demands that we adhere to our prior interpretations of statutes. * * * True, there may be little in logic to defend [the statutory construction] ***. Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."

In *Froud v. Celotex Corp.*, 98 Ill. 2d 324, 336 (1983), this court stated that "[c]onsiderations of *stare decisis* weigh more heavily in the area of statutory construction *** because such a departure *** amounts to an amendment of the statute itself rather than simply a change in the thinking of the judiciary with respect to common law concepts which are properly under its control."

This case presents a textbook example of when a court should follow *stare decisis*. As the Department explained in its brief:

> "The transfer or sale of tangible personal property has been a term of art in Illinois tax law for seventy-five years. When the Illinois legislature passed the Retailers' Occupation Tax Act (ROTA) in 1933, it defined a retail sale as the 'transfer of the ownership of...tangible personal property...for use or consumption...for a valuable consideration.' Laws 1933, p. 924 §1 (*presently codified, as*

amended, at 35 ILCS 120/1 (2006)). This definition remains substantively unchanged. *Id.* When the legislature subsequently defined 'retailing' in the Investment Tax Credit as the sale of tangible personal property, it used an operative phrase that has been included in the definition of retailing for over seven decades, *compare* 35 ILCS 120/1 (2006) with 35 ILCS 5/201(e)(3) (2006), and which has an established legal meaning in Illnois tax law. *See, e.g., Schwak v. Zehnder*, 326 Ill. App. 3d 752, 756, 761 N.E.2d 192 (1st Dist. 2001) (holding that terms used in Investment Tax Credit had same meaning as same terms used in Use Tax and Retailers Occupation Tax Acts).

* * *

In short, the tax treatment of electricity is a well-trod area of Illinois law. In a series of cases dating back decades and extending to the present, this court and the Illinois Appellate Court have established that although electricity is property, it is not sold at retail as 'tangible personal property,' but rather provided as part of a service. Consequently, those who provide electricity services are not subject to taxes imposed on retailers and retail sales, nor are they entitled to credits and exemptions reserved for retailers. The appellate court correctly presumed 'that the legislature acted with knowledge of this prevailing case law' when it used the well-established definition of

retailer in the Investment Tax Credit." Defendants' brief at 9-10, 14.

In addition to the fact that the Illinois courts' treatment of this issue has been consistent for decades, the Department also points out that we have clear evidence that the legislature knows that the courts have declared that electricity is not included within the term "tangible personal property" and that therefore electricity must be specifically mentioned if the legislature intends to include it. *Farrand Coal* was decided in 1957. In 1969, the legislature amended section 5 of the Public Utilities Revenue Act (Pub. Act 76-964, approved August 26, 1969 (now 35 ILCS 620/5 (West 2006))). This section incorporates portions of the Retailers' Occupation Tax Act into the Public Utilities Revenue Act. Because under *Peoples Gas Light & Coke Co.* and *Farrand Coal* electric utilities were not retailers as a matter of law, the legislature explained that "[r]eferences in such incorporated Sections of the Retailers' Occupation Tax Act to sales of tangible personal property mean the distributing of electricity *when used in this Act.*" (Emphasis added.) 35 ILCS 620/5 (West 2006). In contrast, when the legislature enacted the tax credit in question in 1982, the legislature simply used the term "tangible personal property" without any additional language incorporating electricity. See 35 ILCS 5/201(e) (West 2006). Consequently, we must presume that the legislature did not intend for the term "tangible personal property" to include electricity when it enacted the investment tax credit.

Although the majority acknowledges that "[t]he fundamental rule of statutory construction is to give effect to the intention of the legislature" (slip op. at 6), it never explains how it can possibly conclude, given interpretations of tax law dating back to the 1930s, that electric utilities are engaged in the selling of a service and are not retailers of tangible personal property and, given the evidence we have that the legislature is aware of these interpretations and has acted in reliance on them, that the legislature intended to include electricity in the definition of "tangible personal property" in the statute in question.[4] The majority helpfully informs the legislature in a footnote (see slip op. at 14 n. 1) that it may now define "tangible personal property" to include or exclude electricity as it chooses, but ignores the fact the legislature has *already* done this based on our previous definition. That is why it is now the proper role of the judiciary to stay out of the matter. See *Neal*, 516 U.S. at 295-96, 133 L. Ed. 2d at 719-20, 116 S. Ct. at 769. The trial court had it exactly right when it stated in its order: "If Exelon wishes to seek changes to the statute, it should take the matter up with the legislature."

In sum, given the Illinois courts' consistent holdings that electric utilities are not retailers of tangible personal property, and given the evidence that the legislature is aware of this case law and

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[4] This is the principal argument raised by the Department before this court, and the majority has chosen not even to acknowledge it, let alone address it.

has acted in reliance on it, we should adhere to our precedent even if five members of this court now disagree with it and wish that those cases had been decided differently. The legislature already has its definition and it has been free to include electricity as it sees fit. This is a clear example of a situation in which it is more important that the law be settled than that it be settled right.[5] At one point in its opinion, the majority states that "in construing legislation that lacks statutory definitions, this court cannot ignore the laws of physics as humanity has come to understand them." Slip op. at 12. I have not previously seen this canon of statutory construction, but, assuming that it is valid, is it not also true that, in construing statutes that lack statutory definitions, this court cannot ignore *its previous interpretations of those statutory terms as the legislature has come to understand them*? And if these are both valid considerations why would the latter not be of paramount importance to a reviewing court?

Let us now turn to the majority's reasons for abandoning *Farrand Coal*.

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[5] That this is a question that can ever be settled "right" is certainly debatable, as courts are still holding to this day that electricity is *not* tangible personal property. See, *e.g.*, *XO New York, Inc. v. Commissioner of Taxation & Finance*, 856 N.Y.S.2d 310, 51 A.D.3d 1154 (2008); *Omaha Public Power District v. Nebraska Department of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

III. THE MAJORITY'S NOT-SO-NEW SCIENCE

Although the majority does not acknowledge that it is bound by *stare decisis*, it does give reasons for abandoning this court's previous decisions. The majority has chosen to overturn decades of this court's precedents on the basis of the affidavit filed by Dr. Fajans. According to the majority, Dr. Fajans' affidavit reflects the "currently understood electron theory of electricity." Slip op. at 13. The majority then cites three textbooks on electricity and explains that they trace the "understanding of electricity from mysterious force to flowing electrons." Slip op. at 13. The majority also consults a Teach Yourself Electricity and Electronics textbook and cites it for the proposition that " '[i]t is important to understand some simple general physics principles in order to have a full grasp of electricity and electronics.' " Slip op. at 13, quoting S. Gibilisco, Teach Yourself Electricity and Electronics 3 (4th ed. 2006). The majority then explains its belief that *Farrand Coal* was based on our "scientific knowledge of over half a century ago," and states that we should depart from that decision because "[o]ur current understanding of electricity has progressed beyond that time." Slip op. at 14. The portions of Dr. Fajans' affidavit relied on by the majority are his statements that (1) electricity is made up of a material entity-electrons; (2) electricity can be felt, tasted, seen, heard, measured, weighed, and stored, and is subject to the laws of nature; and (3) electricity can be touched or felt because a person may receive a shock from electricity. Slip op. at 12-13. In sum, the

majority's reason for departing from our precedent is that this court's scientific understanding of electricity has progressed since *Farrand Coal* was decided in 1957, and that the points that we now understand that this court did not understand in 1957 are reflected in the highlighted portions of Dr. Fajans' affidavit. A brief history lesson is in order.

The electron in its present-day sense was discovered by the English physicist J.J. Thomson in 1897. 8 Collier's Encyclopedia 788 (1997). However, even before Thomson's discovery, Michael Farrady had discovered by 1833 that electricity was not a continuous fluid but was carried in discrete pieces. 8 Collier's Encyclopedia 787-88 (1997). Other important discoveries about electrons continued throughout the next few decades:

> "The Bohr atom (1913) was the first attempt to describe the behavior of an electron in an atom. Louis Victor de Broglie's idea (1924) on the wave nature of the electron (verified experimentally by Clinton Joseph Davisson and Lester Halbert Germer in 1927) was developed into wave mechanics by Erwin Schrodinger in 1926. Simultaneously, the spin of the electron was deduced by Samuel A. Goudsmit and George E. Uhlenbeck (1925) from various features of atomic spectra. The correct wave equation for the electron was given by Paul A.M. Dirac (1928). The Dirac equation is consistent with special relativity and correctly describes the electron's spin and magnetic moment (aside

> from radiative corrections)." 8 Collier's Encyclopedia 788 (1997).

The Dirac equation predicted the existence of positive electrons, or positrons, and positrons were found in cosmic rays by Carl D. Anderson in 1932. 8 Collier's Encyclopedia 788 (1997).

Shortly after these discoveries, the question of the tangibility of electricity began to be litigated in Illinois courtrooms and elsewhere. In 1934, Time Magazine reported on the trial court proceedings that would form the basis for this court's decision in *Peoples Gas Light & Coke Co. v. Ames*, 359 Ill. 152 (1934):

> "In his Chicago courtroom last week Circuit Judge Harry M. Fisher stared at a voltmeter which had been placed before him on the bench. The voltmeter was connected to a switch, and the switch was connected with the courtroom lights. When the switch was closed Judge Fisher saw the voltmeter needle leap from 0 to 110 on the dial. What he had to decide was whether the thing that made the needle leap was tangible or intangible. There to help him, but arguing on opposite sides of the dispute, were two distinguished Nobel Prizemen.
>
> Point at issue was whether electric current was subject to Illinois 2% Occupation tax. Twenty power companies headed by Commonwealth Edison, Peoples Gas Light & Coke, and Central Illinois Public Service contended that current was an intangible,

> hence nontaxable. The State contended that current was a tangible and taxable commodity. The companies stood to lose in taxes, the State to gain in revenue, some $5,000,000 annually.
>
> No one attacked the orthodox teaching of physics that electric current is a flow of matter having mass. A current of one ampere is a flow of 6,281 billon billion electrons per second past a given point. An electron is a particle of matter weighing 0.8999 billionths of a billionth of a billionth of a gram. But was electric current tangible?
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> Up rose beetle-browed Dr. Arthur Holly Compton (Nobel Prize, physics, 1927). Electricity was tangible, said he, because it could be seen, heard, felt, tasted.
>
> Up rose wiry, tousle-haired Dr. Irving Langmuir (Nobel Prize, chemistry, 1932). Electricity was intangible, said he, because it could not be seen, heard, felt, tasted.
>
> Circuit Judge Fisher watched, listened, pondered. Then, he solemnly pronounced electricity a tangible, taxable commodity." *Electricity in Court*, Time (July 30, 1934).

When the case ultimately reached the supreme court, this court decided that it did not have to determine whether or not electricity was tangible because public utilities are in the business of rendering a service. *Peoples Gas Light & Coke Co.*, 359 Ill. at 158-61. The Retailers' Occupation Tax Act was intended to apply only to those who are in

the business of selling tangible personal property for use or consumption, and utilities are in the business of rendering a service. *Peoples Gas Light & Coke Co.*, 359 Ill. at 158.

In *People v. Menagas*, 367 Ill. 330 (1937), this court considered whether a theft of electric current was covered by the larceny statute. The court received testimony from an electrical engineer who explained that electricity is the motion of electrons, and that an electron is the smallest unit of matter reasonably and accurately known to science. *Menagas*, 367 Ill. at 331. This court held that, although electrical energy is intangible, it can be measured, stored, and carried off. *Menagas*, 367 Ill. at 333. The court ultimately decided that the relevant test for whether something could be the subject of a larceny was whether it could be taken and carried away. Because electrical energy fell within this test, it was covered by the larceny statute, even though it was intangible. *Menagas*, 367 Ill. at 338.[6] The court further explained that this holding was in no way inconsistent with cases such as *Peoples Gas Light & Coke Co.*, which had held that, for purposes of tax statutes, utilities are

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[6] The *Menagas* court twice referred to electrical energy as intangible and never stated that it was simply "assuming" it to be so, and the record before the court contained expert testimony explaining that electricity is the flow of a material entity–electrons. However, even if this was just an assumption, that hardly seems problematic in light of "*Farrand Coal*'s *express holding* that energy is intangible.

engaged in service rather than selling. *Menagas*, 367 Ill. at 338.[7]

In 1942, the Supreme Court of Alabama took up the question of whether electricity is tangible personal property. In *Curry v. Alabama Power Co.*, 243 Ala. 53, 8 So. 2d 521 (1942), the issue was whether the power company was required to pay taxes under the Alabama Use Tax Act. Resolving this issue required the court to consider whether electricity is tangible personal property. Expert testimony was received on this question, and typical of the testimony was that of Dr. K.B. McEachron, who explained that electricity is a flow of electrons, that electricity has mass or weight, that it may be perceived by the senses in that it may be tasted, felt, and touched. *Curry*, 243 Ala. at 56, 8 So. 2d at 522-23. Ultimately, the court determined that it did not have to decide the issue because the legislature had defined electricity as tangible personal property within the meaning of the Use Tax Act. *Curry*, 243 Ala. at 60, 8 So. 2d at 526. Nevertheless, the court decided to weigh in on the question and determined that electricity is

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[7] This court's categorization of electricity as intangible for purposes of theft statutes would remain just as consistent as our categorization of electricity as intangible for purposes of tax statutes. Just last year, this court, in discussing the reach of the theft statute, stated that "the legislature intended to expand the definition of property to include *not only* items of tangible personal property *but also* other things of value such as real estate, *electricity*, and telecommunications services." (Emphases added.) *People v. Perry*, 224 Ill. 2d 312, 328 (2007).

tangible.[8] The court determined that the meaning of tangible, according to Webster's, is " 'capable of being touched, also perceptible to the touch, palpable.' " *Curry*, 243 Ala. at 59, 8 So. 2d at 526. The court determined that electricity fit this definition of "tangible" because electricity is made up of electrons, and electrons have mass or weight. Moreover, electricity can be tasted, smelled, and touched. In fact, a sufficient charge could tear a hole in a person's body. *Curry*, 243 Ala. at 60, 8 So. 2d at 526. This decision was cited and discussed in the parties' briefs in *Farrand Coal*.

In 1957, this court decided *Farrand Coal*. As noted earlier, the briefs in that case contain page after page of scientific argument on the tangibility of electricity. The plaintiff argued, *inter alia*, that electricity can be touched, as when a person receives an electric shock. Moreover, it was perceptible to other senses in that it could be seen and tasted. Further, energy is tangible because it is measurable, real, objective, and corporeal. *Farrand Coal*, plaintiffs brief at 22. Electricity can also be measured and weighed, and it is carried to the customer though a wire by the use of electrons. *Farrand Coal*, plaintiff's brief at 23. The plaintiff discussed *Curry*, and noted that it held that

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[8] The Supreme Court of Alabama's discussion of this issue is what had been–until today–characterized as judicial *dicta*: the resolution of an issue presented by the parties but not necessary for the disposition. In this instance, however, the majority does not recharacterize it as *obiter dicta* and brush it aside. Rather, it describes it as an express holding of the court, which the majority chooses to join. Slip op. at 14.

electricity was tangible because it was made up of electrons and was perceptible to the senses. *Farrand Coal*, plaintiff's brief at 29-30.

In response, the defendants reviewed the scientific testimony and argued that the plaintiff's witnesses were not convincing because they viewed almost everything as tangible and the defendants did not believe that the legislature meant to speak so broadly when it used the term "tangible personal property" in the Retailers' Occupation Tax Act. *Farrand Coal*, defendants' brief at 16. The defendants agreed that "tangible" means "capable of being touched," or "perceptible to the touch," but did not believe that the commonly understood meanings of those terms included energy. *Farrand Coal*, defendants' brief at 11, 16. Moreover, the defendants argued that, although the *effects* of electricity could be felt, that is not the same thing as saying that electricity can be touched. *Farrand Coal*, defendants' brief at 41. The defendants also acknowledged that they were not arguing that electricity was not tangible in any possible sense, and that it may be accurate to describe it as tangible in the sense that everything that exists is tangible. However, the defendants did not believe that the legislature intended to use such a farfetched meaning of "tangible" in the Act in question. *Farrand Coal*, defendants' brief at 43-44. Moreover, the defendants explained that this court's previous holding that electric utilities were engaged in a service business rather than in retailing tangible personal property were well-taken because the only possible tangible things in

electricity would be the electrons, but those are not purchased by the customer. Rather, the electrons flow from the utility, through the customer's appliances, and then back to the utility through a return wire. Thus, the customer is not purchasing electrons, but is purchasing the work that the electrons do. *Farrand Coal*, defendants' brief at 44. The defendants acknowledged that *Curry* had based its decision that electricity is tangible on the basis of electrons, but argued that this was misleading because the electrons are not delivered to the customer by the utility. Rather, the customer pays for and receives the benefit of electric current (a service). *Farrand Coal*, defendants' brief at 45. When a customer plugs in his or her electric coffee pot, the customer gets hot coffee. The customer does not come into possession of whatever caused the coffee to become hot. *Farrand Coal*, defendants' brief at 49-50. The defendants also explained that Illinois cases holding that electric utilities sell a service really disposed of the whole case because, if the utility is not selling tangible personal property to its customers, then it cannot be *reselling* tangible personal property derived from coal or any other source. *Farrand Coal*, defendants' brief at 49.

This court agreed with the parties that the definition of "tangible" is " '[c]apable of being touched; also, perceptible to the touch; tactile; palpable.' " *Farrand Coal*, 10 Ill. 2d at 511, quoting Webster's New International Dictionary (2d ed. 1946). The court, however, expressly declined to wade into the minutiae of the scientific testimony and declare who was right. Rather, the court stated

that "[t]he true criterion on which the decision of this case must turn is not what meaning the respective witnesses may attach to such phrase, but what was the intention and meaning of the General Assembly in using such phrase in the statute in question." *Farrand Coal*, 10 Ill. 2d at 510. The court decreed that energy fell short of "fitting into the ordinary and popularly understood meaning of the word 'tangible' as used by the General Assembly."[9] *Farrand Coal*, 10 Ill. 2d at 511. Thus, the court seemed to accept the defendants' argument that, although energy may be tangible in the sense that everything that exists is tangible, it did not believe that the legislature intended to speak so broadly. Just as importantly, however, the court grounded its decision in this court's precedents. The court noted that it had already held in *Peoples Gas Light & Coke Co.* that electric utilities are engaged in a service business and are not subject to the Retailers' Occupation Tax. *Farrand Coal*, 10 Ill. 2d at 512. Moreover, although this court had held in *Menagas* that electrical energy was personal property in that it could be the subject of larceny, the court in that case twice referred to electrical energy as

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[9] Exelon claims that the court was only speaking about the energy in coal in this portion of the opinion, but the opinion does not state this. Moreover, the defendants in *Farrand Coal*, when arguing that electric energy is intangible, incorporated by reference their arguments about energy in general, noting that "if energy is intangible, electric energy (which is just a form of energy) is necessarily intangible." *Farrand Coal*, defendants' brief at 35-36.

intangible. *Farrand Coal*, 10 Ill. 2d at 512. Finally, the court acknowledged that other courts had held electricity to be tangible personal property, but distinguished those cases on the basis that they either involved statutes declaring electricity to be such or were based on holdings that electric utility companies are engaged in manufacturing commodities. This was contrary to this court's holding in *People ex rel. Mercer v. Wyanet Electric Light Co.*, 306 Ill. 377 (1922), which held that electric utilities are neither manufacturing nor mercantile companies. *Farrand Coal*, 10 Ill. 2d at 512.

Several things should be apparent to the reader at this point. First, the highlighted points in Dr. Fajans' affidavit are not at all new, and, in fact, predate *Farrand Coal*. We are *not* departing from *Farrand Coal* because that case was based on our scientific understanding of over half a century ago and our scientific understanding has progressed beyond that time. Slip op. at 14. Rather, we are overthrowing 75 years of consistent, established precedent for no other reason than that Exelon went out and hired an expert to testify to the exact same things that experts have been testifying to since the 1930s. Although the majority claims that our scientific understanding has progressed since 1957, the Supreme Court of Alabama had reached the same point for the same reasons in 1942.

Second, the irrelevance of the majority's citation to three electricity texts with the parenthetical "tracing understanding of electricity from mysterious force to flowing electrons" should now

be apparent. This is *not* something that has happened since 1957. It is not the case that the *Farrand Coal* court was in a benighted state of scientific understanding, believing that electricity was a mysterious force, but the present court understands that electricity is a flow of electrons. Rather, the *Farrand Coal* court understood perfectly well that electricity is a flow of electrons. Moreover, as Time Magazine reported in 1934, in the trial court proceedings that led to this court's decision in *Peoples Gas Light & Coke Co.*,

> "[n]o one attacked the orthodox teaching of physics that electric current is a flow of matter having mass. A current of one ampere is a flow of 6,281 billon billion electrons per second past a given point. An electron is a particle of matter weighing 0.8999 billionths of a billionth of a billionth of a gram." *Electricity in Court*, Time (July 30, 1934).

Similarly irrelevant is the majority's citation to Teach Yourself Electricity and Electronics for the proposition that one must understand general physics principles to grasp electricity and electronics, as the majority never identifies any principles of physics that the *Farrand Coal* court was unable to grasp. Indeed, it is the majority's inability to grasp that *Farrand Coal* was not based on *any* theory of electricity that makes it unable to see that its entire opinion rests on an invalid premise. Third, the reader will note that Dr. Fajans' points about electricity being perceptible to the senses and that a person can receive a shock

from electricity are equally as stale and long predate *Farrand Coal*.

The only thing in Dr. Fajans' affdavit that the majority points to that postdates *Farrand Coal* would be his assertion that scientists have recently been able to see the density of electrons with scanning tunneling microscopes.[10] The scanning tunneling microscope was developed in 1981. See http://en.wikipedia.org/wiki/Scanning_tunneling_microscope (last visited December 5, 2008). But surely the majority does not believe that this is any reason to overturn *Farrand Coal*. First, this was not an advancement in electrical theory. The scanning tunneling microscope merely allowed scientists to get a better look at what they already knew was there. Second, this court's previous decisions holding that electric utilities render service instead of retailing tangible personal property are *not* based on any disbelief in the electron or the density of electrons. The scanning tunneling microscope might be relevant if this court had stated that until someone could prove that electrons have density, we would classify electricity as intangible, but this court never said or implied any such thing. Finally, let us examine where the majority's scanning tunneling microscope point takes us in terms of legislative intent. Would any member of today's majority be willing to step forward and make the following argument? When the legislature enacted the tax credit in question in

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[10] In its brief, Exelon does not rely on this portion of Dr. Fajans' affidavit.

1982, it was aware that this court had held that electric utilities are not retailers of tangible personal property. The legislature, however, wanted this tax credit to be available to electric utilities. The legislature considered simply defining tangible personal property as including electricity, as it had done in section 5 of the Public Utilities Revenue Act. But then someone pointed out that, just the previous year, the scanning tunneling microscope had been invented. Realizing that scientists would use this to see the density of electrons, the legislature concluded that the Illinois Supreme Court would change its mind about the tangibility of electricity, and therefore the legislature could simply use the undefined term "tangible personal property" and wait for this court to overrule *Farrand Coal*. Unless the majority is willing to make this extravagant argument, I think it will have to concede that the invention of the scanning tunneling microscope in 1981 does not offer any insight into whether the legislature intended this tax credit to be available to electric utilities.

Fourth, when the majority states that *Farrand Coal* was based on our scientific understanding of over half a century ago, the majority fails to contemplate the extent to which *Farrand Coal* declined to weigh in on the battle of scientific experts in that case. Thus, as soon as one begins searching for the answers to the legal questions raised in this appeal in Teach Yourself Electricity and Electronics or Electric Universe: The Shocking True Story of Electricity, that person has missed

entirely the point of *Farrand Coal*. The experts gave extensive, detailed arguments in *Farrand Coal*, and the parties expounded on these points at great length in their briefs. But, as the Department pointed out, this court expressly *declined* to declare if any particular expert was right and simply said that "[t]he true criterion on which the decision of this case must turn is not what meaning the respective witnesses may attach to such phrase, but what was the intention and meaning of the General Assembly in using such phrase in the statute in question." *Farrand Coal*, 10 Ill. 2d at 510. One thing that should be abundantly clear to anyone who has read both the briefs and the decision in *Farrand Coal* is that, had Dr. Fajans' affidavit been part of the record in that case, it would not have made the slightest bit of difference to this court's decision. In *Farrand Coal*, this court did not *believe* that the legislature intended to speak so broadly as to include electricity within the definition of tangible personal property. But now that *Farrand Coal* explained that electricity is not tangible personal property, *we know for sure* that the legislature does not intend to include electricity when it uses the term "tangible personal property."

At oral argument, one of the justices asked the Department's attorney if the question before this court is a scientific one. The simple answer to that question is "no." If *Farrand Coal* would have settled the battle of experts and based its conclusion on who had the science of the issue correct, and if there was no evidence that the legislature had relied on that conclusion, and if the science had in

fact changed since that time, then perhaps the question before this court would be a scientific one. But none of those things are true. Perhaps because the *Farrand Coal* court realized that this body is ill equipped to resolve disputes among physicists, it relied simply on what it believed the legislature intended when it used the term "tangible personal property." The question before this court is *not* a scientific one, but a legal one that this court is well equipped to answer: Should we presume that when the legislature enacted the tax credit in question it acted with knowledge of this court's long-standing determinations that electric utilities are not retailers of tangible personal property? That is the question before the court, and the majority never answers it.

Instead, the majority makes a scientific determination after having heard only one side of the argument. Dr. Fajans stated that electricity is tangible as a matter of irrefutable scientific fact, but our cases show that scientists–even Nobel prize winners–dispute this fact every time the question is litigated. In this case, the Department asked for time to get its own expert if the question were determined to be a factual one, but the Department prevailed on its claim that this question has been decided by this court as a matter of law, and the Department can hardly be faulted for grounding its position in this court's precedents. If distinguished scientists cannot agree on this question, should the justices of this court not be leery of believing that they can solve the question by reading Teach Yourself Electricity and Electronics? Moreover, if

the majority now wants to make this a factual issue, it oversimplifies the question when it determines that all we need to know is that electrons are matter–a fact that was not contested even in 1934. Also relevant is whether electrons are what is sold by the utility to the customer. In other words, are electric utilities retailers of electrons or of the work that electrons do? The argument was made in *Farrand Coal* that because the electrons flow from the utility to the customer and then back to the utility, the customer never purchases electrons from the utility. Rather, the customer is simply purchasing the work that electrons do–something that is unquestionably intangible. This conclusion is supported by the testimony of the expert witness in *Menagas*, who explained that "[w]hen the electrons are going out through the conductor they are charged with potential energy, but when forced through the resistance, such as an electric light bulb or a motor, the potential energy is taken out, and the electrons return to the generator possessing only kinetic energy." *Menagas*, 367 Ill. at 332. If there is anything in Dr. Fajans' affidavit that would call these conclusions into question and suggest that the customer actually purchases electrons from the utility, the majority has not cited it.

Fifth, the majority also fails to comprehend the extent to which *Farrand Coal* was grounded in this court's precedents, particularly *Peoples Gas Light & Coke Co.*, which held that electric utilities are in the business of rendering a service and are not retailers of tangible personal property. The only

significance the majority sees in *People's Gas Light & Coke Co.* is that the court deemed it unnecessary to determine whether electricity was tangible personal property. Slip op. at 11. But the *reason* the court found it unnecessary to decide that question was that the court concluded that electric utilities were not retailers of *any* property, tangible or otherwise. Rather, they were engaged in a service business. See *People's Gas Light & Coke Co.*, 359 Ill. 2d at 154-61. The upshot is that we now have pronouncements from the Illinois Supreme Court that, for purposes of Illinois tax statutes using virtually identical definitions, electric utilities both *are* (*Exelon*) and *are not* (*People's Gas Light & Coke Co.*) retailers of tangible personal property.[11]

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[11] On a side point, the majority refers to Dr. Fajans' affidavit and report as being "unrebutted." Slip op. at 11. It is not clear whether, by using this term, the majority is giving credence to Exelon's claim that it is entitled to judgment in its favor because this affidavit was unrebutted. It should be pointed out that the Department argued that whether Exelon was involved in retailing was a question of law under the statute, and the Department requested time to obtain its own expert witness in the event that this was determined to be a question of fact. The ALJ agreed with the Department that, as a matter of law, Exelon was not engaged in retailing. It would have been apparent to anyone who understood this court's decisions in *Peoples Gas Light & Coke Co.* and *Farrand Coal* that there was no point in getting another expert affidavit on the tangibility of electricity. Since the Department prevailed on its point that this was a question of law, and since the Department could not possibly have anticipated either the indifference this court would show to its own precedent or that this court would treat 100-year-old

Finally, as to the majority's statement that the discussion of the tangibility of electricity was "skewed by the true issue presented in that case" (slip op. at 14), there was no one "true issue" in *Farrand Coal*. There were several distinct issues because the plaintiff's claim required it to prove several different things. The court discussed all of the issues, and its discussion of the tangibility of electricity was not "skewed" by anything. Quite the contrary, as thoroughly demonstrated above, it was solidly grounded in this court's precedents. This court had already held that electric utilities were in the business of rendering service, not retailing tangible personal property, and this court and the appellate court have consistently followed that precedent. In fact, the only "skewed" decision on this issue in the past 75 years is the present one, in which a majority of this court allowed its judgment to be skewed by an affidavit that merely rehashed points that have been made since the 1930s.

The majority trumpets as a benefit of its holding that Illinois will now be brought into line with California, Rhode Island, Alabama, and Florida, which have all held electricity to be tangible personal property in different contexts. Slip op. at 14. But the majority never explains the relevance of

---

science as new, there is little relevance in Dr. Fajans' affidavit being unrebutted. Moreover, as to Exelon's point that the unrebutted affidavit requires this court to find that electricity is tangible, that would necessarily mean that if in the next tax case a part presents an unrebutted affidavit that electricity is intangible, this court would be forced to change its mind again.

this or what possible benefit will ensue. This is no more relevant or consequential than the fact that we have now created a conflict with Nebraska and New York, which have held electricity not to be tangible personal property. See *XO New York, Inc. v. Commissioner of Taxation & Finance*, 856 N.Y.S.2d 310, 51 A.D.3d 1154 (2008); *Omaha Public Power District v. Nebraska Department of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). The important question is *not* what other states have held, but what our legislature intended when it used the phrase "tangible personal property" in this particular tax statute. Given this court's previous decisions, there can be no question.

IV. CONCLUSION

I would affirm the appellate court's determination that Exelon was not engaged in retailing under the statute and address the uniformity clause issue. See, *e.g.*, *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 193-207 (2007) (Kilbride, J., dissenting, joined by Karmeier, J.) (disagreeing with majority's statutory construction, recommending that court address the constitutional issue, but not doing so in the dissent, and drawing no objection from the majority). This court has consistently held that electric utilities are engaged in rendering service, not in retailing tangible personal property. The legislature has understood for decades that, for purposes of Illinois tax law, the term "tangible personal property" does not include electricity, and has acted accordingly. It is now the proper role of the judiciary to stay out. The majority has demonstrated a surprising

indifference to this court's established precedent, first violating *Cates* by casting aside this court's discussion of an issue central to a plaintiff's claim and fully briefed by the parties as *obiter dicta*, and then overturning 75 years of consistent, established precedent on the basis of ancient science that predates that precedent. One senses in the majority opinion a sincere desire to demonstrate that the Illinois Supreme Court is on the cutting edge of the latest science. Unfortunately, the relevant science has not changed in the past 75 years, and there is no evidence that the legislature's intent has either.

Appendix C

SUPREME COURT OF ILLINOIS

Springfield, Illinois, September 28, 2009

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 103529 - People State of Illinois, appellee, v. Paul Runge, appellant. Appeal, Circuit Court (Cook).
Petition for rehearing denied.
Opinion modified upon denial of rehearing.

No. 103937 - People State of Illinois, appellee, v. Michael Glasper, appellant. Appeal, Appellate Court, First District.
Petition for rehearing denied.

No. 105582 - Exelon Corporation, appellant, v. Illinois Department of Revenue et al., etc., appellees. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Burke, J., took no part.

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Appendix D

Constitution of the United States

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United

States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Effective Until December 31, 2008

Chapter 35. Revenue

Act 5. Illinois Income Tax Act

Article 2. Tax Imposed

➡ 5/201. Tax Imposed

§ 201. Tax Imposed.

****

(e) Investment credit. A taxpayer shall be allowed a credit against the Personal Property Tax Replacement Income Tax for investment in qualified property.

(1) A taxpayer shall be allowed a credit equal to .5% of the basis of qualified property placed in service during the taxable year, provided such property is placed in service on or after July 1, 1984. There shall be allowed an additional credit equal to .5% of the basis of qualified property placed in service during the taxable year, provided such property is placed in service on or after July 1, 1986, and the taxpayer's base employment within Illinois has increased by 1% or more over the preceding year as determined by the taxpayer's employment records filed with the Illinois Department of Employment Security. Taxpayers who are new to Illinois shall be deemed to have met the 1% growth in base

employment for the first year in which they file employment records with the Illinois Department of Employment Security. The provisions added to this Section by Public Act 85-1200 (and restored by Public Act 87-895) shall be construed as declaratory of existing law and not as a new enactment. If, in any year, the increase in base employment within Illinois over the preceding year is less than 1%, the additional credit shall be limited to that percentage times a fraction, the numerator of which is .5% and the denominator of which is 1%, but shall not exceed .5%. The investment credit shall not be allowed to the extent that it would reduce a taxpayer's liability in any tax year below zero, nor may any credit for qualified property be allowed for any year other than the year in which the property was placed in service in Illinois. For tax years ending on or after December 31, 1987, and on or before December 31, 1988, the credit shall be allowed for the tax year in which the property is placed in service, or, if the amount of the credit exceeds the tax liability for that year, whether it exceeds the original liability or the liability as later amended, such excess may be carried forward and applied to the tax liability of the 5 taxable years following the excess credit years if the taxpayer (i) makes investments which cause the creation of a minimum of 2,000 full-time equivalent jobs in Illinois, (ii) is located in an enterprise zone established pursuant to the Illinois Enterprise Zone Act and (iii) is certified by the Department of Commerce and Community Affairs (now Department of Commerce and Economic

Opportunity) shall notify the Department of Revenue of all such certifications immediately. For tax years ending after December 31, 1988, the credit shall be allowed for the tax year in which the property is placed in service, or, if the amount of the credit exceeds the tax liability for that year, whether it exceeds the original liability or the liability as later amended, such excess may be carried forward and applied to the tax liability of the 5 taxable years following the excess credit years. The credit shall be applied to the earliest year for which there is a liability. If there is credit from more than one tax year that is available to offset a liability, earlier credit shall be applied first.

(2) The term "qualified property" means property which:

(A) is tangible, whether new or used, including buildings and structural components of buildings and signs that are real property, but not including land or improvements to real property that are not a structural component of a building such as landscaping, sewer lines, local access roads, fencing, parking lots, and other appurtenances;

(B) is depreciable pursuant to Section 167 of the Internal Revenue Code, except that "3-year property" as defined in Section 168(c)(2)(A) of that Code is not eligible for the credit provided by this subsection (e);

(C) is acquired by purchase as defined in Section 179(d) of the Internal Revenue Code;

(D) is used in Illinois by a taxpayer who is primarily engaged in manufacturing, or in mining coal or fluorite, or in retailing, or was placed in service on or after July 1, 2006 in a River Edge Redevelopment Zone established pursuant to the River Edge Redevelopment Zone Act; and

(E) has not previously been used in Illinois in such a manner and by such a person as would qualify for the credit provided by this subsection (e) or subsection (f).

(3) For purposes of this subsection (e), "manufacturing" means the material staging and production of tangible personal property by procedures commonly regarded as manufacturing, processing, fabrication, or assembling which changes some existing material into new shapes, new qualities, or new combinations. For purposes of this subsection (e) the term "mining" shall have the same meaning as the term "mining" in Section 613(c) of the Internal Revenue Code. For purposes of this subsection (e), the term "retailing" means the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities.

(4) The basis of qualified property shall be the basis used to compute the depreciation deduction for federal income tax purposes.

(5) If the basis of the property for federal income tax depreciation purposes is increased after it has been placed in service in Illinois by the taxpayer,

the amount of such increase shall be deemed property placed in service on the date of such increase in basis.

(6) The term "placed in service" shall have the same meaning as under Section 46 of the Internal Revenue Code.

(7) If during any taxable year, any property ceases to be qualified property in the hands of the taxpayer within 48 months after being placed in service, or the situs of any qualified property is moved outside Illinois within 48 months after being placed in service, the Personal Property Tax Replacement Income Tax for such taxable year shall be increased. Such increase shall be determined by (i) recomputing the investment credit which would have been allowed for the year in which credit for such property was originally allowed by eliminating such property from such computation and, (ii) subtracting such recomputed credit from the amount of credit previously allowed. For the purposes of this paragraph (7), a reduction of the basis of qualified property resulting from a redetermination of the purchase price shall be deemed a disposition of qualified property to the extent of such reduction.

(8) Unless the investment credit is extended by law, the basis of qualified property shall not include costs incurred after December 31, 2008, except for costs incurred pursuant to a binding contract entered into on or before December 31, 2008.

(9) Each taxable year ending before December 31,

2000, a partnership may elect to pass through to its partners the credits to which the partnership is entitled under this subsection (e) for the taxable year. A partner may use the credit allocated to him or her under this paragraph only against the tax imposed in subsections (c) and (d) of this Section. If the partnership makes that election, those credits shall be allocated among the partners in the partnership in accordance with the rules set forth in Section 704(b) of the Internal Revenue Code, and the rules promulgated under that Section, and the allocated amount of the credits shall be allowed to the partners for that taxable year. The partnership shall make this election on its Personal Property Tax Replacement Income Tax return for that taxable year. The election to pass through the credits shall be irrevocable.

For taxable years ending on or after December 31, 2000, a partner that qualifies its partnership for a subtraction under subparagraph (I) of paragraph (2) of subsection (d) of Section 203 or a shareholder that qualifies a Subchapter S corporation for a subtraction under subparagraph (S) of paragraph (2) of subsection (b) of Section 203 shall be allowed a credit under this subsection (e) equal to its share of the credit earned under this subsection (e) during the taxable year by the partnership or Subchapter S corporation, determined in accordance with the determination of income and distributive share of income under Sections 702 and 704 and Subchapter S of the Internal Revenue Code. This

paragraph is exempt from the provisions of Section 250.

****

FILED

No. 09-759

IN THE

Supreme Court of the United States

EXELON CORPORATION,

Petitioner,

v.

THE ILLINOIS DEPARTMENT OF REVENUE AND BRIAN A. HAMER, AS DIRECTOR OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, Petitioner Exelon Corporation ("Exelon") files this Supplemental Brief in Support of Petition for Writ of Certiorari to bring to the Court's attention the petition for writ of certiorari and related briefing in *Triple-S Management v. Municipal Revenue Collection*, No. 09-233 (petition attached as App. A).

On January 11, 2010, this Court invited the Solicitor General to submit a brief in the *Triple-S* case before the Court decides whether to grant certiorari. (Order attached as App. B.) Although the *Triple-S* petition was filed before Exelon's petition, the Court's invitation to the Solicitor General called *Triple-S* to Exelon's attention.

ARGUMENT

The petition in *Triple-S* asks this Court to resolve a question closely related to one of the questions presented in Exelon's petition: whether the Due Process Clause limits the ability of a governmental entity, other than a legislature, to impose lengthy retroactive tax liability. *Triple-S* addresses the power of a Puerto Rican executive agency to do so; this case addresses the power of a state's judiciary to do so.

In *Triple-S*, the Department of Treasury in Puerto Rico classified petitioners Triple-S, Salud Inc. and its parent company, Triple-S Management, Corp. (collectively, "Triple-S"), as tax-exempt for nearly thirty years. (Pet. App. A at 15a.) In 2003, however, the department changed its view and concluded Triple-S was not entitled to tax-exempt status. (*Id.* at 19a.) In 2003, Treasury applied the new status only

prospectively as to Triple-S's income taxes, but in 2006, another agency applied it retroactively, creating fifteen years of retroactive property tax liability. (*Id.* at 14a, 19a-20a.) Triple-S filed suit, challenging the retroactive taxation as violating the Constitution's Due Process Clause. (*Id.* at 14a-15a, 20a-23a.) The courts below effectively decided that curing the prior mistaken interpretation of the law sufficiently justified the extensive period of retroactivity, and that the initial interpretation could be treated as null and void from the start. (*Id.*) Triple-S's petition to this Court followed.

Exelon's case is analogous to *Triple-S*. In *Triple-S*, the executive agency imposed a 15-year retroactivity term by claiming it was "correcting" its prior documented interpretation of the law. In Exelon's case, a state court imposed a 14-year period of retroactivity by refusing to apply what it admits is the correct interpretation of the law. In both cases, the retroactive governmental action created significant tax liability – 15 years of back property taxes for the previously tax-exempt *Triple-S* petitioners, and for Exelon, nearly $80 million in tax credits denied incorrectly as a matter of law.

The retroactive governmental action in Exelon's case, however, offends due process principles even more egregiously than that in *Triple-S*. The lower courts in *Triple-S* justified their approval of the agency's retroactive action in part by reasoning that the agency was curing its prior incorrect interpretation of the law. (*Id.* at 20a-23a.) Here, no similar purported "justification" exists: the Illinois Supreme Court announced the correct interpretation

of the law in Exelon's case (addressing tax years 1995 and 1996), but – on denial of rehearing – refused to apply it in this case, a pending case involving tax years 1997 through 1999 (even though that case was stayed pending the resolution of this case), and the remaining open tax years for which Exelon was eligible for the tax credit, 2001 through 2008. (Exelon Pet. 3 n.2, 5-6.) The Illinois Supreme Court was not curing a prior incorrect interpretation, nor did it announce a change in the law. Rather, that court enshrined the Illinois Department of Revenue's *in*correct interpretation of the law despite its conclusion that the state legislature had intended the opposite result. (*Id.* at 9-11.) In this way, Exelon's retroactive tax liability is even more harsh, oppressive, and unjustified than that imposed in *Triple-S*.

However, both *Triple-S* and this case highlight an open question in this Court's tax retroactivity jurisprudence – whether due process allows retroactive tax burdens imposed by a government entity other than a legislature, when under *United States v. Carlton*, 512 U.S. 26 (1994) and other of this Court's cases, those same retroactive burdens would violate the Due Process Clause if enacted by a legislature. As both Triple-S and Exelon argue, the retroactivity limits provided by the Due Process Clause apply to *all* governmental bodies, not just legislatures. (Exelon Pet. 7, 12-15; Pet. App. A at 30a-31a.) Indeed, if (as this Court has repeatedly held) due process limits retroactive legislative action, it must also limit such action by courts and administrative agencies. That both of these cases are

before the Court within such a short span of time proves the importance of resolving this question. The Court should grant certiorari here to do so.

CONCLUSION

For the foregoing reasons, along with the reasons expressed in Exelon's petition for a writ of certiorari, Exelon respectfully urges the Court to grant certiorari in this case.

In the alternative, Exelon requests that the Court hold this case and decide it in conjunction with the *Triple-S* case. In its petition for a writ of certiorari, Triple-S alternatively requested this Court to hold its case pending the outcome of *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection,* No. 08-1151, on which the Court heard oral argument on December 2, 2009. (Pet. App. B.) For the reasons set forth therein, if this Court decides to hold the *Triple-S* case pending the Court's decision in *Stop the Beach Renourishment*, it also should hold this case.

Respectfully submitted,

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Appendix

Appendix A

No. 09-233

In the
Supreme Court of the United States

TRIPLE-S MANAGEMENT, CORP.;
TRIPLE-S SALUD, INC.,
Petitioners,

v.

MUNICIPAL REVENUE
COLLECTION CENTER (CRIM),
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

---

PETITION FOR WRIT OF CERTIORARI

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August 25, 2009

QUESTION PRESENTED

For nearly 30 years, the executive branch invited specific reliance on its interpretation of law by issuing numerous authoritative, formal, and expressly binding rulings that a private entity was legally entitled to tax-exempt status as long as it complied with a long list of conditions. The executive branch then reversed its legal position. Rather than make that change prospective only, however, it reached back to impose 15 years of retroactive financial liability as well.

The question presented is:

Is the executive branch, unlike the legislative branch, free of all due process constraints on retroactive government action, no matter how far back in time that retroactivity runs, how harsh and oppressive the retroactivity might be, how justified a private entity's reliance might be, or whether the government has any rational basis for making its change retroactive, as long as the executive branch asserts that its earlier interpretation of law was "wrong?"

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Supreme Court of the Commonwealth of Puerto Rico:

1. Triple-S Management, Corp.
2. Triple-S, Inc. (now, Triple-S Salud, Inc.)
3. Centro De Recaudaciones De Ingresos Municipales [Municipal Revenue Collection Center]

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Triple-S Management, Corp. and Triple-S Salud, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico.

OPINIONS BELOW

The orders and judgment of the Supreme Court of Puerto Rico are at App. 89–100. The opinion of the Court of Appeals is reprinted at App. 1, and the opinions of the Court of First Instance are reprinted at App. 43–88.

JURISDICTION

The Supreme Court of Puerto Rico issued its order denying certiorari on March 13, 2009. App. 89. Petitioners' timely final petition for rehearing was denied by order officially notified and recorded on May 27, 2009. App. 97. This Court has jurisdiction under 28 U.S.C. § 1258.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions and statutes are set forth at App. 101–130.

STATEMENT OF THE CASE

A. Factual Background

The undisputed facts in this case are simple and straightforward. They present one of the most extreme examples of government-imposed retroactive financial liability ever presented to this Court. For nearly 30 years, through at least six

different formal, final, and binding administrative rulings, state administrative entities that had been delegated enforcement power over the local tax codes concluded that petitioners were entitled to tax-exempt status as a matter of law. Moreover, the agencies' formal published guidelines expressly promised that rulings of this sort were binding and would be revoked or modified, if at all, only prospectively. App. 131–173, 180–216. Then, in 2003 and 2006, these agencies decided to make a 180-degree about-face in their interpretation of the law. App. 174–179. They notified petitioners that, based on a changed interpretation of law, they were revoking their earlier rulings. Rather than make this new interpretation prospective—to which petitioners would have no constitutional objection—one agency demanded retroactive payment of taxes reaching back 15 years.

The courts below rejected petitioners' due process challenge on the theory that agencies are entitled to change their interpretations of law and to apply them retroactively simply by declaring an earlier interpretation "wrong." Moreover, the lower courts held that agencies may do so without giving any justification at all for the length of the retroactivity period or taking into account the nature of the justifiable reliance interest private parties possess based on prior, consistent, formal, final, and expressly binding agency interpretations. Thus, under the rulings below, the executive branch can always change its interpretation of law and make those changes as retroactive as it likes—regardless of how harsh and oppressive that retroactivity might

be, and how justified private reliance on nearly 30 years of authoritative, consistent, regularly reaffirmed interpretations to the contrary might be—because due process has no application when agencies change their legal interpretations retroactively. All an agency need do, and all the agency did here, is announce that its prior interpretation of the law was "wrong."

Petitioner Triple-S, Salud Inc. ("Triple-S")[1] is a health insurance provider in Puerto Rico and successor to an entity founded in 1959 to provide pre-paid, low-cost medical and hospital insurance to Puerto Rico's middle and working classes. Triple-S Management, Corp. is the parent company of Triple-S. For nearly 30 years, from July 16, 1976 until July 31, 2003, the Department of the Treasury in Puerto Rico ("Treasury") issued numerous formal rulings that recognized Triple-S's entitlement to income and property tax exemption. Treasury repeatedly concluded that Triple-S qualified for tax-exempt treatment by operating as a non-profit entity. *See* Puerto Rico Property Tax Act, P.R. Laws Ann. tit. 13, § 551(t) (repealed 1991), App. 115; Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3101(8) (repealed 1994), App. 124; *see also* 21 L.P.R.A. § 5151(g), 13 L.P.R.A. § 8506(6) (current versions of statutes).

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[1] Triple-S, Inc., a petitioner in the Puerto Rico Supreme Court, changed its corporate name to Triple-S Salud, Inc. in February 2009. For simplicity, the petitioners will be referred to as "Triple-S."

Puerto Rico's income tax laws grant an exemption to "organizations that are not organized for purposes of profit but rather that function exclusively for the promotion of social welfare" and "the net earnings of which are dedicated exclusively to charitable, educational, or recreational purposes." P.R. Laws Ann. tit. 13, § 3101(8), App. 124. Like similar federal and state tax exemptions, the purpose of this exemption is to encourage such organizations to devote their resources to the public welfare rather than private profit. Although Triple-S was formally incorporated as a for-profit entity in 1959, there is no dispute that it did so only because incorporating as a non-profit entity was not feasible for an insurance provider under Puerto Rico law at the time. App. 131, 132, 145–151. As Treasury concluded, from its inception Triple-S operated in fact as a non-profit entity. The subscribers of Triple-S, doctors and dentists only, relinquished any right to dividends. Treasury noted that Triple-S regularly filed numerous sworn assurances with Treasury that Triple-S operated as a non-profit organization that did not pay dividends or bestow assets on shareholders, and that it was in fact dedicated to promoting social well-being by offering affordable health insurance to a segment of the Puerto Rican population that, up to that point, had no options for health insurance. App. 132–133, 138–140, 145–147.

Because Triple-S was operating as a non-profit entity for all relevant purposes, Treasury concluded that Triple-S was entitled to tax-exempt status for income-tax purposes, but only as long as it complied with approximately five pages of rigorous terms and

conditions Treasury laid out. App. 133–135, 138–140. Treasury first reached this conclusion in two rulings in the 1970s, App. 131–141, then reaffirmed it in subsequent decisions over the next two decades. App. 141–160. Each of these Treasury rulings required Triple-S to comply with numerous conditions, including ones that limited the compensation of Triple-S's officers and directors, required Treasury-specified levels of reserve requirements, required Triple-S to invest its surplus in a defined manner (to lower premium costs), and required annual filings that included sworn assurances regarding Triple-S's operations. In direct, specific reliance on these binding rulings—including that any change in Triple-S's tax status would be prospective only—Triple-S complied with all the conditions designed to ensure its substantive non-profit status.

Treasury revisited the status of Triple-S for a fourth time in 1987 when it considered Triple-S's request for tax exemption on all of its real and personal property. Once again, Treasury concluded that Triple-S was legally entitled to tax-exempt status, this time under the property tax law, P.R. Laws Ann. tit. 13, § 551(t) (repealed 1991). Again, Treasury issued a letter ruling to this effect. App. 142.

In 1991, the Puerto Rico Legislature created the Municipal Revenue Collection Center (known as CRIM, for its Spanish acronym), a new entity to take over Treasury's powers to collect real and personal property taxes. The new law transferred to CRIM all

"the obligations" of Treasury regarding personal and real-property taxes, as well as Treasury's "powers and functions." Act of Aug. 30, 1991, No. 80, § 23(f), App. 119. In 1998, CRIM found that Triple-S continued to be legally entitled to the property tax-exemption that Treasury had recognized previously. In addition, CRIM ruled that "the rights acquired by Triple-S [under the Treasury rulings] will continue in effect" under the laws CRIM enforced. App. 163. That same year, Treasury also reaffirmed the income tax exemption for Triple-S. Together, then, Treasury and CRIM considered Triple-S's tax status on six separate occasions and reached the same conclusion each time: Triple-S was legally entitled to tax-exempt status for income and property taxes.

Treasury's determinations were formal and binding. Treasury made its rulings in formal Administrative Determination Letters ("Letter Rulings"). These letters, modeled after Internal Revenue Service ("IRS") letter rulings, are "official interpretations by the Department as to the application of the Code, or any other tax law, to the acts or transactions represented by the taxpayer." App. 180. These Letter Rulings are "binding on the Department as long as the representations upon which the ruling was based reflect an accurate statement of the material facts with respect thereto, and the transaction was carried out as proposed, and there has been no change in the law and regulations that apply" to the relevant period. App. 186. Triple-S provided full and accurate information at all times and met all the terms and conditions set by Treasury. There has never been any allegation to

the contrary. Thus, Triple-S complied with all of Treasury's requirements for tax-exempt status under its Letter Rulings.

Although Puerto Rico did not change its tax laws in any relevant respect, in July 2003, Treasury changed its view of the proper income tax treatment of Triple-S. Specifically, in what Treasury itself called a "new public policy," Treasury came to the view that entities had to be formally incorporated and organized as non-profit entities to receive the tax exemption, regardless of whether they functioned in fact as non-profits. App. 175. Treasury, for its part, did not seek to change Triple-S's income tax-exempt status retroactively. Rather, Treasury followed its internal rules against taxing entities retroactively as long as there were no omissions or misstatements of facts, no changes in the applicable law or regulations, and the taxpayer relied in good faith on a Letter Ruling. Treasury simply determined that, going forward, Triple-S would no longer be exempt from income taxes. Triple-S has not objected to this conclusion.

CRIM also decided to change Triple-S's property tax status. But, unlike Treasury, CRIM demanded retroactive taxes from Triple-S going all the way back to the year of CRIM's inception—despite the many previous binding rulings from Treasury and CRIM over nearly 30 years that Triple-S was tax exempt, and despite CRIM's recognition in 1998 that Triple-S was entitled to rely on these prior rulings. In March 2006, CRIM issued tax notices informing Triple-S that it was revoking Triple-S's real and

personal property tax exemptions and that its ruling would apply retroactively to personal property taxes from 1991, the year when CRIM was first established, and to real property taxes from fiscal year 1992-1993 onward. The only reason CRIM did not go even further back in seeking retroactive taxes is that CRIM did not exist until 1991; otherwise, CRIM presumably would have demanded retroactive taxes going back to the beginning of Triple-S's existence. There is no other limiting principle in the agency's or the lower courts' theory of retroactivity; that theory sweeps back literally to the creation of CRIM or the taxpayer. CRIM did not base its decision to impose retroactive taxes on a conclusion that Triple-S had provided factually misleading or incomplete information. Nor did CRIM refute the fact that Triple-S acted in good-faith reliance on the binding Letter Rulings from Treasury and on CRIM's own reaffirmation of Triple-S's tax-exempt status. CRIM simply changed its mind about the meaning of the operative legal provision and sought to have that shift in position apply retroactively, despite Triple-S's good faith reliance on the government's previous formal orders.

B. Proceedings Below

Triple-S filed two separate complaints, on March 28, 2006 and May 24, 2006, in Puerto Rico state court challenging CRIM's retroactive imposition of real- and personal-property taxes on federal constitutional and other grounds, including a claim that the taxes violated the federal Due Process

Clause. Triple-S did not challenge its obligations to pay taxes prospectively.

Without separately considering the Due Process Clause claim, the Court of First Instance rejected Triple-S's claims on a motion for summary judgment. App. 46. The trial court concluded that, because the agency's new interpretation was "correct," all the prior binding administrative rulings were irrelevant for constitutional purposes. The trial court gave no weight to the reliance interests Triple-S had in the six rulings by Treasury and CRIM that granted Triple-S tax-exempt status on the basis that Triple-S was operating for all relevant purposes as a non-profit. The trial judge also concluded that due process imposed no limit on the retroactive change in interpretation. Instead, the trial judge held that, despite Treasury's longstanding, consistent, prior rulings, Puerto Rico's tax laws required formal incorporation as a non-profit to receive non-profit tax status. Thus, the trial judge reasoned that those earlier rulings were "ultra vires, contrary to the law, and, therefore, null." App. 84. Despite the formality of the Letter Rulings and Triple-S's good-faith reliance on them, the trial judge ruled as if those Letter Rulings had never existed. The judge also thought that curing past legal "mistakes" was a sufficient justification to answer any due process concerns. According to that reasoning, CRIM was free to act as if it was operating on a blank slate. With the stroke of a pen, the trial judge thus erased the six formal rulings made over a span of 27 years by CRIM and its predecessor agency. Even though Triple-S designed its operations in good-faith

reliance on those rulings and neither the law nor the facts had changed, the trial court decided that Triple-S had no valid constitutional claim.

In a consolidated appeal involving both the real- and personal-property tax cases, the Court of Appeals affirmed in an opinion that mirrored the reasoning of the lower court. Specifically, the Court of Appeals agreed that Triple-S could not object to the retroactive imposition of taxes because the earlier decisions by Treasury and CRIM could be treated as "null and void" from the start. App. 37–38. In the view of the Court of Appeals, the plain language of Puerto Rico's tax law required formal incorporation status as a non-profit—even when such incorporation was impossible and the entity operated for all intents and purposes as a non-profit in fact, pursuant to specific limitations and conditions the Treasury demanded. App. 35, 37. The fact that Treasury and CRIM, the agencies charged with enforcing the law, had concluded otherwise for more than 27 years, or that Triple-S had structured itself in good-faith reliance on those agency interpretations, was of no legal relevance to the Court of Appeals. The court held that the earlier actions should be regarded as "ultra vires" and hence that CRIM could change course as if these earlier rulings and the justifiable reliance they had induced had never occurred. App. 39-40. Thus, by pretending the executive branch's longstanding, formal, authoritative, and binding prior legal rulings had never happened, an agency was free, constitutionally, to give its changed legal

interpretation as massive a retroactive effect as it cared to impose.

The Supreme Court of Puerto Rico denied certiorari. App. 89–92. Petitioners raised their federal constitutional claim at every opportunity: in their complaints, their summary judgment papers before the trial court, their briefs on appeal, and their petition for certiorari to the Puerto Rico Supreme Court. The courts below uniformly rejected petitioners' due process arguments and concluded that nothing in the Due Process Clause limits the authority of the executive branch to impose massive retroactivity as long as the earlier agency position that induced reliance is deemed "wrong."

REASONS FOR GRANTING THE PETITION

The courts below decided an important question of federal constitutional law in a way that is at odds with bedrock constitutional principles and many decisions of this Court on retroactive government action. The Court has recognized, under numerous constitutional provisions, that retroactive legislation raises acute concerns about violating what this Court has characterized as "fundamental notions of justice" recognized since the Framing. The decision below conflicts with those cases, and raises broad issues of general importance, by holding that these principles are inapplicable when it comes to retroactive administrative changes in policy and law. This Court's intervention is needed to address whether, and to what extent, the same constitutionally based "fundamental notions of justice" reflected in this Court's retroactivity decisions limit the power of

agencies to destroy reasonable, investment-backed private reliance interests when agencies change their interpretations of law and apply those interpretations retroactively.

The courts below thought the Constitution gave *carte blanche* for administrative retroactivity, no matter the scope or justification, as long as the agency asserts that its change in legal interpretation "corrects" a prior view. In addition to being in tension with this Court's decisions, that position conflicts with that of several federal Courts of Appeal. This case presents an important opportunity to clarify this Court's doctrines governing due process limits on administrative retroactivity. By determining the due process limits on the retroactivity of agency interpretations of law, the Court's decision in this case would clarify what has become a fundamentally uncertain area of law since this Court's last decision on the topic, *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), decided more than twenty years ago.

In addition, this Term the Court will hear a case that addresses whether retroactive judicial changes in common-law rules can violate the Due Process Clause. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 998 So. 2d 1102 (Fla. 2008), *cert. granted,* No. 08–1151, 129 S. Ct. 2792 (June 15, 2009). Surely it would be an odd constitutional logic that would place constitutional limits on legislative and judicial retroactivity while leaving agencies completely immune from similar constraints. Yet that is precisely what the decisions

below do. At a minimum, this petition should be held until the Court decides *Stop the Beach* and can consider the implications of its decision for this case.

I. THE DUE PROCESS CLAUSE IMPOSES LIMITS ON ADMINISTRATIVE RETROACTIVITY.

1. Two preliminary points should be noted. First, this Court has held that the Due Process Clause, as well as numerous other provisions of the Constitution, applies to Puerto Rico. *See generally Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 331 n.1 (1986); *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 7 (1982); *Torres v. Puerto Rico,* 442 U.S. 465, 471 (1979).[2] Second, petitioners could protect their due process rights in this case only through litigation in the Puerto Rico courts and in this petition for certiorari. The Butler Act, a statute analogous to the Tax Injunction Act, 28 U.S.C. § 1341 (2009), specifically denies federal district courts in Puerto Rico the power to hear any suit "for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico." 48 U.S.C. § 872 (2009). This Court is the only federal forum in which petitioners' due process rights can be vindicated.

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[2] The Court has not decided more specifically whether it is the Due Process Clause of the Fifth or the Fourteenth Amendment that binds Puerto Rico. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 668–669, n. 5 (1974). Because the Fifth Amendment Takings Clause is incorporated through the Fourteenth Amendment Due Process Clause, this petition's Taking Clause arguments are subsumed in the petition's Due Process Clause arguments.

2. On the merits, this Court has recognized, in area after area of law, that retroactivity is disfavored "in accordance with 'fundamental notions of justice' that have been recognized throughout American and English legal history." *Eastern Enters. v. Apfel,* 524 U.S. 498, 532 (1998) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Thus, the Court has held that an independent rational justification for a statute's retroactive application must exist above and beyond the justification that suffices for the statute's prospective effect; the Due Process Clause provides special protection for "the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 266 (1994); *see also Eastern Enters.,* 524 U.S. at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (concluding that the Due Process Clause protects against "an unfair retroactive assessment of liability [that] upsets settled expectations" because a law that does so "undermines a basic objective of law itself" that "hearkens back to the Magna Carta").

Under the Takings Clause, the Court has held legislation unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Eastern Enters.,* 524 U.S. at 528–29. Under the Contract Clause, the Court has noted that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective

legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). In interpreting statutes, the Court has enforced a strong presumption against reading statutes to be retroactive, absent a clear statement from Congress itself. *Landgraf*, 511 U.S. at 280. In administrative law, the Court has held that federal agencies do not have the power to adopt retroactive regulations unless Congress has expressly delegated such an extraordinary power. *Bowen*, 488 U.S. at 208; *see also United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (holding that when private actors have relied in good-faith on consistent, longstanding administrative interpretations of law, "traditional notions of fairness" preclude the government from prosecuting based on alternative interpretation). Finally, in its separation-of-powers jurisprudence, the Court has held that Congress acts unconstitutionally when it retroactively tries to re-open final judicial judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

3. Even in the area of taxation, where the Court has been somewhat more tolerant of retroactive legislation, the Court has nonetheless consistently held that courts must scrutinize such legislation carefully to ensure it satisfies a two-part test: the retroactivity must itself have a rational purpose and the period of retroactivity must be modest. *United States v. Carlton*, 512 U.S. 26, 30–32 (1994); *see also Welch v. Henry*, 305 U.S. 134, 147 (1938) (noting

that due process is violated when "retroactive application [of tax legislation] is so harsh and oppressive as to transgress the constitutional limitation"). Accordingly, the brief periods of retroactive taxation that this Court has upheld have extended back no farther than the date at which the change in taxation was proposed—typically, a period of a year or less before the date of the tax change's enactment. *See Carlton,* 512 U.S. at 37–38 (O'Connor, J., concurring) (in "every case in which we have upheld a retroactive federal tax statute against a due process challenge the law applied retroactively for only a relatively short period"). The Court has upheld brief periods of retroactivity on the theory that the government may reasonably prevent taxpayers from taking advantage of "a lengthy legislative process" by avoiding tax liability while the legislature debates statutory revisions. *See, e.g., United States v. Darusmont,* 449 U.S. 292, 296–97 (1981) (*per curiam*) (upholding 10-month retroactivity on the ground that this "customary congressional practice" generally has been "confined to short and limited periods required by the practicalities of producing national legislation."); *see also Carlton,* 512 U.S. at 38 (O'Connor, J., concurring) (a "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise ... serious constitutional questions"). No justification of that sort is present here. In this case, the agency imposed 15 years of retroactive tax liabilities after it had encouraged investment-backed reliance on its prior legal interpretation.

In addition to considerations of justified reliance and fairness, retroactive government action also risks a "temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. As Justice Kennedy has noted:

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern Enters., 524 U.S. at 548–49 (Kennedy, J., concurring in the judgment and dissenting in part). The Court has recognized a fortress of protections that secure justified, investment-backed reliance, but the decisions below blast a gaping hole for retroactive agency interpretations of law.

4. The question in this case, of broad general importance, is whether these same principles have any application to agency decisions to make changes in interpretation of law retroactive, especially when an agency's formal policies expressly invite investment-backed reliance by stating that any change in interpretation will be prospective only. If a legislature decided to amend a tax statute and reach back 15 years to tax, such a law would surely be unconstitutional under *Carlton* and related cases. In this case, Treasury adopted what it itself declared to be a "new public policy" regarding interpretation of the tax code. App. 175. The question presented here is stark: whether due process is *irrelevant*, as the courts below in effect held, when an agency, rather than a legislature, adopts a "new public policy" under the guise of interpretation.

As a general matter, the principles that disfavor retroactive enforcement of legal change apply to administrative agencies as well as to legislatures. *See Bowen,* 488 U.S. at 208 (because "[r]etroactivity is not favored in the law," "congressional enactments *and administrative rules* will not be construed to have retroactive effect unless their language requires this result") (emphasis added). No justification in principle or precedent exists for concluding that due process limits on retroactivity constrain legislatures but somehow leave the executive branch completely unfettered. No less than statutes, administrative rules and orders can give rise to private expectations protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Perry v. Sindermann,* 408 U.S. 593, 602-03 (1972) (noting

that "rules and understandings, promulgated and fostered by state officials" may create a property interest protected by the Fourteenth Amendment's Due Process Clause).

The various constitutional principles that limit the power of legislatures to disrupt settled expectations must limit less-democratically accountable administrative agencies as well. The legislature cannot delegate to an agency a power that the legislature itself is constitutionally prohibited from exercising. *Cf. Arizona Grocery Co. v. Atchison, Topeka, & Santa Fe Ry.*, 284 U.S. 370, 388 (1932) (the Commission's action "in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose").

5. This is not to say that the general due process constraints that limit legislative retroactivity apply identically in the administrative context. The Due Process Clause prohibits government from retroactively disrupting the settled expectations of private persons who *reasonably rely* on prior law. In the agency context, for example, a legislature might not confer power on agency officials to make binding commitments to private parties; in that case, any reliance by private citizens would not be reasonable and principles of due process or equitable estoppel would not bar agency officials from reversing their own illegal actions on which those citizens may have relied. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990). Agency rules and orders might also indicate implicitly or explicitly that they

lack binding force of law. Informal guidance documents and other non-binding interpretative rules, for instance, do not purport to set forth legally enforceable rules that bind either the government or private parties. *See, e.g., Gehl Co. v. Commissioner of Internal Revenue,* 795 F.2d 1324, 1333 (7th Cir. 1986) ("as a general rule, informal Treasury publications and pamphlets ... do not bind the government" and, because they "are simply guides, ... a taxpayer who relies on them generally does so at his own peril").

But this case poses a simpler and more fundamental issue. If, as here, an agency has undisputed statutory authority to issue binding assurances about the meaning of a statute and the agency exercises such authority to give assurances to private actors that a current rule or order will not be overturned retroactively, due process must then bar an agency from disrupting citizens' reliance on such statements through retroactive reversal of such rules or orders. Due process must constrain the power of agencies that formally bind themselves to non-retroactivity from then turning around and reversing their own rules and orders. Agency interpretations of law can justifiably generate reasonable, investment-backed reliance, as in this case, and the agency's destruction of that reliance can therefore similarly violate due process. At a minimum, due process must ensure that agencies not willfully induce citizens to rely on rulings and to make substantial investments that the agency then destroys by violating its own statutorily authorized, formal policies and promises.

II. THE COURTS BELOW WRONGLY HELD AGENCIES IMMUNE FROM DUE PROCESS LIMITS ON RETROACTIVE POLICYMAKING BY ALLOWING AN AGENCY TO "CORRECT" PRIOR RULINGS WITHOUT REGARD TO THE REASONABLENESS OR EXTENT OF PRIVATE, INVESTMENT-BACKED RELIANCE ON THOSE EARLIER RULINGS.

The central question at stake here is whether due process applies at all when agencies change their interpretations of law retroactively. The Court should grant *certiorari* to resolve that threshold issue. But in resolving that question, the Court should clarify that three essential principles, reflected in the Courts' retroactivity cases, should guide the determination whether an agency's retroactive reversal of its interpretation of law is consistent with due process or impermissibly destroys reasonable, investment-backed reliance: First, whether the agency has statutory authority to issue self-binding interpretations of law and has exercised that authority. Second, whether the private reliance that the agency's interpretation induced was reasonable. Third, whether the period of retroactivity is so severe in length as to be exceptionally harsh and oppressive under this Court's precedents. The retroactive administrative action in this case violates all three of these principles. Thus, this case presents a good vehicle for establishing the due process boundaries on retroactive agency interpretation of law.

A. Treasury Had Statutory Authority To Issue Self-Binding Letter Rulings Regarding Specific Taxpayers.

There is no dispute that Treasury was the agency charged with implementing Puerto Rico's tax code when it issued the income tax Letter Rulings at issue in this case. At the time the income tax Letter Rulings were issued, the authority was found in title 13, section 3429(a) of the laws of Puerto Rico. Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3429(a) (repealed 1994) ("The Secretary shall promulgate the necessary rules and regulations to enforce this Subtitle"). Equally clear, the Secretary had the power to define the retroactive effect of any "Treasury decision." Puerto Rico Income Tax Act of 1954, P.R. Laws Ann. tit. 13, § 3429(b) (repealed 1994). Furthermore, there is no dispute that Treasury was the agency charged with implementing Puerto Rico's property tax law when it issued the property tax Letter Ruling in 1987. At the time it issued the property tax Letter Ruling, Treasury's authority was codified in 13 L.P.R.A. § 3473. P.R. Laws Ann. tit. 13, § 473 (the "Secretary is authorized to publish all regulations, orders and instructions that are necessary for the execution of Title IX of the Political Code..."). All the relevant rulings were issued not by low-level administrative agents, but at highest levels of the Treasury, such as by subcabinet secretaries. App. 136, 141, 144, 160.

These grants of power are substantially identical to, and indeed were modeled on, statutory language conferring power on the U.S. Secretary of the

Treasury to implement the Internal Revenue Code through (among other decisions) private letter rulings to taxpayers. This power to issue private letter rulings has long been used by the IRS to issue rulings binding on the IRS in relation to the taxpayer who requested the ruling. Rev. Proc. 2006-1, 2006-1 I.R.B. 1, § 11(.06) ("Where the revocation or modification of a letter ruling is for reasons other than a change in facts as described in section 11.05 ..., it will generally not be applied retroactively to the taxpayer for whom the letter ruling was issued or to a taxpayer whose tax liability was directly involved in the letter ruling."). Although some controversy exists over whether private letter rulings have precedential effect for third parties, *see* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by its Own Regulations and Rulings?*, 51 TAX LAW. 675 (1998), there is no controversy about the IRS's power to bind itself in relation to the specific persons who request its opinion in an official private letter ruling.

In light of these broad grants of authority, neither the courts below nor CRIM argued that Treasury lacked the statutory power to issue Letter Rulings to taxpayers providing them with binding guidance as to their tax liabilities. Instead, the courts below maintained that such letters could not be binding to the extent they contained errors of law, because such errors constituted "*ultra vires* acts by public officials" that "do not create rights, do not obligate the administrative organism, nor does it impede it from effectuating a correction." App. 39. In effect, the court below ruled that, despite the

existence of statutory authority to issue binding private Letter Rulings, the government must have the implied power to disregard its own assurances to taxpayers in order to correct what the government now believes was a mistake of law.

By overlooking Treasury's statutory authorization to issue binding Letter Rulings, the court of appeals ignored a constitutionally critical consideration for evaluating whether Triple-S acted reasonably in relying on Treasury's policies against retroactive changes in rulings. The general rule barring equitable estoppel against the government is fundamentally rooted in the notion that, absent legislation bestowing power on an official to bind the government, officials' representations about the law cannot estop the government from changing its views about the law's requirements. Critically, if the relevant statutes confer such power to issue binding rulings on officials, then this justification for the anti-estoppel rule evaporates. *See Office of Pers. Mgmt.*, 496 U.S. at 428 ("Congress may always exercise its power to expand recoveries for those who rely on mistaken advice should it choose to do so").

B. Triple-S's Reliance On Treasury's Prior Rulings Was Reasonable Because Treasury Had Expressly Given Assurances That Letter Rulings Would Not Be Retroactively Revoked.

The letter rulings in this case are fundamentally different in a second respect from any government action that this Court has permitted to be retroactively revoked. Treasury itself expressly

stated in official policy documents that its rulings would not be overturned retroactively with respect to the specific taxpayer to whom the earlier ruling had been issued. Circular 86-3, which Treasury issued in 1986, specifically states that, "[e]xcept in rare or unusual circumstances, the revocation or modification of a ruling or administrative determination will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued." App. 187. The Circular provides three conditions for the operation of this anti-retroactivity policy, and no dispute exists that all three are met in this case. The property-tax rulings that Treasury issued to Triple-S in 1987 were issued pursuant to the terms and policies of this Circular. In 1999, Treasury adopted a new Circular, 99-01, that included the same policy commitment against retroactivity. App. 212.

The basis of the 15-year retroactivity imposed in this case has nothing to do with any "rare and unusual circumstances" that justify departing from the anti-retroactivity policy to which Treasury committed itself and to which CRIM was also obligated. The agency's retroactive decision does not identify any such circumstances, nor do the decisions of the courts below. Instead, the lower courts believed it wholly sufficient to ask a completely different question: whether Treasury had erred in its earlier analysis of the tax code such that its earlier rulings were "null." In effect, this holding means that Treasury policies against retroactive changes are binding only until Treasury (or a successor agency) changes its mind about the ruling's merits—

a view that treats as legally irrelevant Treasury's own Circulars committing to a policy that its rulings would survive any later change of mind Treasury might have.

Treasury's endorsement of an anti-retroactivity policy distinguishes this case from other decisions in which this Court has upheld the retroactive repeal of agency rulings. In other contexts, the agency in question had never adopted policies or extended specific assurance that its ruling would not be retroactively revised. Absent such assurances, the Court has adopted the position that the agency reserves the power to correct its prior mistakes of law through retroactive revision of its earlier rulings. *See, e.g., Dixon v. United States,* 381 U.S. 68, 73 (1965). In such cases, any reliance would be unreasonable. Not so here.

This case is instead on par with decisions of lower courts that have held it an abuse of discretion for agencies retroactively to repeal their rulings after making assurances that the agency would forego retroactive changes. In *Lesavoy Foundation v. Commissioner of Internal Revenue,* 238 F.2d 589 (3d Cir. 1956), for instance, the Third Circuit held that the Commissioner abused his discretion by retroactively revoking a certificate of exemption given to the Foundation in 1945 and retroactively assessing the Foundation for five years of taxes between 1946 and 1951. Acknowledging that "the Commissioner may change his mind when he believes he had made a mistake in a matter of fact or law," the Third Circuit nonetheless noted that "it is

quite a different matter to say that ... the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling." *Id.* at 591. In finding that the administrative retroactivity was an abuse of discretion under the statute, the Third Circuit placed special emphasis on the individualized nature of the ruling and the Commissioner's past custom and written policy of not revoking retroactively exempt-status rulings as to the persons to whom they were issued. *Id.* at 591 & nn. 5–6.

Similarly, the Seventh Circuit in *Gehl Co. v. Commissioner of Internal Revenue,* 795 F.2d 1324 (7th Cir. 1986), held that the Commissioner abused his discretion in enforcing an interpretation of the disputed tax provision that was different from that contained in the IRS's handbook published for the guidance of taxpayers. *Id.* at 1333–34. While acknowledging that such guidance documents did not normally estop the government from changing its legal interpretations, the Seventh Circuit emphasized the specific assurance in the handbook stating that the handbook's interpretation would not be retroactively repealed, noting that such a statement was "more than an interpretation of existing law; it is an express promise that the Commissioner will not in the future exercise his discretion to apply adverse changes retroactively." *Id.* at 1333. According to the Seventh Circuit,

> This is a specific statement designed to elicit reliance on the part of taxpayers,

> as opposed to a typical publication which may well say nothing on the issue of the retroactivity of future changes. While silence on this subject may fairly be viewed as implicitly saying "beware to those who rely on this publication; you do so at your own peril," an express promise cannot fairly be construed in this fashion .... Not only did this promise reasonably induce reliance; the promise was originally made specifically to create such reliance. To allow the Treasury to renege on such express promises with impunity is grossly unfair. As the Second Circuit aptly noted, "the retroactive applications of regulations in the face of a promise of prospectivity smells of a bushwack."

Gehl Co., 795 F.2d at 1333 (citing *LeCroy Research Sys. Corp. v. Commissioner of Internal Revenue*, 751 F.2d 123, 124, 128 (2d Cir. 1984)).

These cases address the statutory "abuse-of-discretion" standard under the Internal Revenue Code, *see id.* at 1332, but should inform the analysis of whether administrative retroactivity, including that at issue here, disrupts reasonable reliance on government's commitments. Both the standards of constitutional due process and the statutory "abuse-of-discretion" standard incorporate concern for the disruption of private expectations. *See Anderson, Clayton, & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977).

As *Gehl Company* notes, such a flagrant disregard for the agency's own assurances to specific taxpayers approaches an impairment of the government's own contract with a private party. *Cf. United States v. Winstar,* 518 U.S. 839 (1996). In effect, Treasury entered into a bargain with Triple-S under which, in return for Triple-S's compliance with elaborate conditions insuring that Triple-S's resources were devoted to public health, the Treasury would treat Triple-S as a non-profit corporation for the purposes of taxation.

By operating under the terms of the exemptions stipulated in the rulings, Triple-S was required to invest its surplus in a defined manner (lower premium costs, etc.), was precluded from distributing dividends, and was required to structure itself in a variety of other ways. Had CRIM informed Triple-S in 1991 that it would not be entitled to the property tax exemptions that had originally been recognized by Treasury in 1987, Triple-S might well have foregone these costly measures and instead conducted business as a for-profit entity. Indeed, that is precisely what occurred in 2003 when Triple-S was notified that its tax exemption was going to be revoked prospectively: Triple-S decided to change its structure and corporate philosophy to that of a publicly traded for-profit corporation with the capacity to conduct its business and invest its surplus free from the requirements that the agency rulings had previously imposed.

Having secured public benefits from Triple-S for fifteen years, CRIM now seeks to renege on this

bargain in order to get the benefits of foregone property tax revenues that had been offered to induce Triple-S to maintain its public health commitment. To imagine a more direct violation of the *quid pro quo* inherent in the Treasury's tax ruling would be difficult. Such repudiation of government obligations meant to induce investment-backed reliance are not only unfairly manipulative to the individual, they are also detrimental to the long-term interests of government. *See Gehl Co.*, 795 F.2d at 1334; *see also* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment,* 94 MICH. L. REV. 1129, 1139 (1996) (observing that "[b]ecause taxpayers who relied on the repealed incentive credit were 'burned' by the government, future incentive credits would have to be more generous (for example, the credit percentage would have to be greater to achieve the same amount of increased investment in the targeted asset or activity")).

C. The Burden On Triple-S's Expectations Was Extraordinarily Severe In Light Of The Extreme Length Of Retroactivity Imposed.

CRIM ruled that Triple-S owed property taxes for a retroactivity period of fifteen years, a period apparently based on nothing more than the fact that CRIM itself came into existence only in 1991. This breathtaking back-to-creation position knows no limits: if CRIM had existed in the late 1980s, its position is that it would be entitled to demand retroactive taxes reaching back over 20 years. As this Court has noted in the context of tax legislation,

limited periods of retroactivity are constitutionally permitted because they are justified by the legitimate interest in preventing taxpayers from avoiding imminent or pending changes in tax policy of which they have fair notice. *See supra* at 15–16. The length of the retroactivity period is highly relevant, therefore, to the constitutionality of administrative retroactivity. Due process requires that courts assess, as the courts below did not, whether an agency has a rational justification for the extent of the retroactivity and how harsh the retroactivity period is to private actors.

In sum, the courts below failed to give any weight to a private entity's reasonable, investment-backed reliance on expressly binding and statutorily authorized agency commitments. The decisions below ignore *all* the considerations offered above: the Treasury's specific policy guidelines stating that prior rulings would not be overturned retroactively, the statutory authorization for making binding Letter Rulings, the six formal, consistent rulings of tax-exempt status issued over nearly 30 years, and the extraordinarily long period of retroactivity. Instead of evaluating the reasonableness of Triple-S's reliance or the burden on Triple-S's expectations, the court of appeals rooted its holding in the sole consideration that all six of the earlier administrative rulings were erroneous. The paramount—indeed, exclusive—consideration in the court's due process analysis was that administrative agencies must have unlimited power to correct prior "mistakes" by retroactively overruling those mistakes.

This analysis amounts to blanket immunity for administrative retroactivity. Presumably, agencies do not reverse prior rules or adjudicated precedents unless they believe that the new decision better captures the language or purpose of the statute than the rules and precedents being reversed. And, if the new interpretation is not "correct," it will not be in effect, prospectively or retrospectively. To give agencies *carte blanche* regardless of the length of the retroactivity period, past assurances by the agency, or reasonableness of the private citizen's reliance is to eviscerate any due process restraint on retroactive agency policy-making. *Cf. Bowen,* 488 U.S. at 225 (Scalia, J., concurring) (noting that "curative retroactivity" would "make a mockery" of APA limits on retroactive rule-making because agencies would always be free to "reissue" a rule on a retroactive basis).

In order to place minimal outside limits on such regulatory uncertainty, due process requires that agencies and reviewing courts give at least some consideration to factors other than the agency's desire for the fullest retroactive enforcement of new policies and interpretations. These factors include the reasonableness of private reliance on the prior legal regime, the severity of the burden on private parties, the length of the retroactivity period, and the nature of the government's interest in retroactivity. Such factors have always been considered under constitutional retroactivity analysis. *See Carlton,* 512 U.S. at 27 (finding a rational basis for retroactivity because "Congress

acted promptly and established only a modest period of retroactivity").

III. THE TENSION BETWEEN *CHEVRON* AND RETROACTIVE AGENCY INTERPRETATIONS OF LAW FURTHER ENHANCES THE IMPORTANCE OF THE QUESTION PRESENTED.

The importance of the legal question presented here is magnified by the tension between the position the courts below adopted and the line of cases represented by *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967 (2005), and last Term's decision in *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800 (2009). These cases recognize that there may be a range of permissible agency interpretations of a statute, that a single "right" agency interpretation of a statute does not necessarily exist, and that agencies may legitimately adopt different positions over time concerning the meaning of a statute—including an interpretation that directly contradicts an earlier interpretation. *See, e.g., Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996) (noting that "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"). But precisely because of the greater discretion the *Chevron* regime recognizes for agency legal interpretation, it becomes all the more imperative that, when agencies do change their legal

interpretations, agencies be constrained by the due process principles that apply to retroactive legal changes, including that there be adequate justification for the period of retroactivity that takes account of the change-in-position reliance interests that a prior, binding interpretation invited.

Before *Chevron*, rule-of-law values in the context of agency interpretations of law were enforced, in part, by this Court's reluctance to defer to agency interpretations that shifted dramatically over time. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the extent of judicial deference to an agency interpretation will vary depending upon that interpretation's "consistency with earlier and later pronouncements"); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 339 (6th ed. 2006) ("Before *Chevron*, courts held that longstanding and consistent agency interpretations were entitled to special deference; a showing that agencies had been inconsistent would reduce or eliminate deference to an agency interpretation of law."). Because *Chevron*, as elaborated in *Brand X* and *Fox*, permits agencies to be granted deference even for inconsistent interpretations of law, rule-of-law values require that courts ensure that retroactive application of changed agency legal interpretations be adequately justified. Otherwise, *Chevron* risks becoming a vehicle for undermining the core due process values of fair notice and justifiable reliance.

To be sure, *Chevron* does not directly apply of its own force to state agencies, as in this case. But the

general due process retroactivity principles remain the same: agencies may be free to change their legal interpretations prospectively, but when they seek to make those changes retroactive, the risks of exploiting vulnerable individuals or entities, and the potentially harsh and oppressive burdens of changes that undermine reasonable, investment-backed reliance interests, require at the least that such retroactive changes be justified by more than an agency's mere decision to adopt a "new public policy" concerning the meaning of a law. Moreover, the greater the flexibility federal agencies have to shift their policies, the more important these general due process principles become. As this Court noted in *FCC v. Fox Television Stations,* it would be arbitrary and capricious when agencies change their legal interpretations for an agency to ignore the fact that "its prior policy has engendered serious reliance interests that must be taken into account." 129 S. Ct. at 1811. Yet that is precisely what the agency and the courts below did here. The more free that agencies are to change their legal interpretations, the more important it becomes for courts to enforce against agencies, as the Court has long done against legislatures, due process principles that require adequate justification for making retroactive changes that defeat reasonable-reliance interests. The courts below failed to require any such justification at all.

IV. AT A MINIMUM THE COURT SHOULD HOLD THIS PETITION PENDING DECISION OF A CASE THIS TERM.

At a minimum, this Court should hold this petition pending its decision in *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection,* No. 08-1151. That case raises the question whether the judiciary can, consistent with the Due Process Clause, retroactively eliminate property rights by reinterpreting state law. Stop the Beach Renourishment argued in its petition for certiorari that "a state court cannot by *ipse dixit* proclaim 100 years of property rights never really existed." *Stop the Beach,* No. 08-1151, Petition for Writ of Certiorari, at 20. As Justice Stewart explained in his concurring opinion in *Hughes v. Washington,* 389 U.S. 290 (1967), "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296–97.

CRIM eliminated Triple-S's due process rights in precisely the same manner. CRIM merely declared that the earlier grants of tax exemption were null and void and should be treated as if they never existed, despite the fact that those rulings had been in effect for over two decades and that Triple-S had investment-backed reliance interests based on Treasury having encouraged Triple-S to organize its structure and operation around those rulings.

Just as Triple-S does here, the petitioner in *Stop the Beach* specifically highlighted the retroactive effect of the change in law as the due process deficiency. The petition for certiorari in that case cited approvingly the Ninth Circuit's decision in *Robinson v. Ariyoshi,* 753 F.2d 1468 (9th Cir. 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986), in which the Ninth Circuit held that states are free to change laws by either judicial or legislative action but that *retroactive* application of a change in law was what triggered due process concerns. *Id.* at 1474. In that case, the change by the judiciary amounted to a judicial taking.

If the Court ultimately agrees with the petitioner's argument in *Stop the Beach* and holds that judicial takings through retroactive changes in state law violate the Due Process Clause, this petition should be granted and the judgment below vacated and remanded. For if a state does not avoid its due process obligation not to take property retroactively by using the judiciary to do its bidding, surely it cannot achieve the same ends by having a right retroactively stripped by an executive branch agency. Indeed, as this Court stated more than a century ago, "the prohibitions of the [Fourteenth] amendment refer to all instrumentalities of the state—to its legislative, executive, and judicial authorities—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation of the state, violates the constitutional inhibition." *Chicago Burlington &*

Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–34 (1897) (internal quotation and citation omitted).

There should be no doubt that it would defy constitutional logic for due process to constrain the extent to which the legislative branch can make new law retroactively and the extent to which the judicial branch can make new common law retroactively, but for executive branch agencies to be immune from similar constraints when they make new law through reinterpreting statutes.

CONCLUSION

The petition for certiorari should be granted or, in the alternative, held pending resolution of *Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection,* No. 08-1151.

Respectfully submitted,

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August 25, 2009

Appendix B

--- S.Ct. ----, 2010 WL 58369 (U.S.Puerto Rico), 78 USLW 3391
(Cite as: 2010 WL 58369(U.S. Puerto Rico))

Only the Westlaw citation is currently available.

Supreme Court of the United States

TRIPLE-S MANAGEMENT, ET AL. V. MUNICIPAL REVENUE COLLECTION.

No. 09-233.

Jan. 11, 2010.

*1 The Solicitor General is invited to file briefs in this case expressing the views of the United States.

U.S.,2010.

Triple-S Management Corp. v. Municipal Revenue Collection Center

--- S.Ct. ----, 2010 WL 58369 (U.S.Puerto Rico), 78 USLW 3391

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